Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, 1996

IN RE ESTATE OF EDNA CLARA REEDY
Deceased

LAWRENCE B. MUCKLOW,
Petitioner,

vs.

SHERRY E. FARROW HARVEY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA'S SUPREME COURT AND/OR TO ITS FOURTH DISTRICT COURT OF APPEAL, DIV. TWO

ERIKA W. SENTER, Esq.
4199 Campus Drive, Suite 700
Irvine, California 92612-2698
tel (714) 854-5309
fax (714) 854-4897

Counsel of Record
for Petitioner
Lawrence B. Mucklow

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QUESTIONS PRESENTED

1.

Does California's "nonpublication" law [California Rules of Court, rules 976-979] whereby the California Supreme Court can without granting judicial review, and without explaining its reasoning, abrogate the precedential value of an aberrant appellate opinion by making the suspect decision disappear for all except the involved litigants (the "*California vacatur*"), mark an abridgment of important fundamental rights of petition, due process, and equal protection of the laws?

2.

Where a state's legislature and its lower court of appeal have contemporaneously spoken, but inconsistently so, on a questioned matter that is governed by statutory law, not by common law, and a *California vacatur* had been issued on the inconsistent appellate opinion, does the state court of last resort violate its constitutional duty of judicial review when it abstains from adjudicating the re-asserted direct conflict between the judicial construction and legislative clarification of the questioned statute?

3.

Where statutory law, not common law, governs a state's intestate succession law, is the *separation of powers* clause of the Constitution violated by a court decree that directs distribution of an intestate estate to the children of decedent's adopted-out child when the states's legislature has unambiguously legislated that children of adoptees do not inherit from their natural grandparent because the adoption has severed the parent-child relationship through which succession rights flow?

PARTIES TO THE PROCEEDING

Three separate claims are asserted in this probate proceeding:

1. The claim asserted by LAWRENCE B. MUCKLOW,[1] brother of the decedent, reflecting the inheritance interests of decedent's natural relatives, a group of 23 siblings and nieces and nephews, who inherit *if* the decedent left neither spouse nor issue.

2. The claim asserted by VIVIENNE LYNN KIRK (co-appellant below) a grandchild of decedent's pre-deceased husband, who succeeds to half of the former community-property home, *if* the decedent left neither spouse nor issue.

3. The claim asserted by the respondents, SHERRY FARROW HARVEY, THOMAS O. FARROW and JAMES E. FARROW, the three children of an adoptee who profess to be the decedent's biological grandchildren -- and thereon -- claim the entire inheritance as decedent's lawful "*issue.*"

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1. Lawrence B. Mucklow died on January 7, 1995, while this case was pending on appeal; that is, he died after the trial judgment was entered. Under well-settled California law an appeal survives the death of the appellant and may be continued, in the name of the decedent, without a formal substitution of parties. If necessary, at the conclusion of the appeal, a new judgment will be entered *nunc pro tunc*. [California Code of Civil Procedure §669: "If a party dies after trial and submission of the case to a judge sitting without a jury for decision or after a verdict upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon." *Accord*, California Code Civil Procedure §368.5: "[A] proceeding may, on the transfer of any interest in it, be continued in the name of the original party."] Mr. Mucklow's still open probate expressly lists the appeal in his estate. The executor of his estate, Karyn L. Story, has elected to continue the appeal without seeking a change in the name of the parties. To the extent that an affidavit, pursuant to California Code of Civil Procedure §377.32 – setting forth the death and the probate – is advisable, to avoid a plea of abatement, such will be (or has already been) filed. *Note:* §377.32 "does not require that the affidavit be filed as a precedent to commencing or continuing an action." *Parsons v. Tickner* (1955) 31 CA 1513, 1523-1524.

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PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA'S SUPREME COURT AND/OR TO ITS FOURTH DISTRICT COURT OF APPEAL, DIV. TWO

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Petitioner, LAWRENCE B. MUCKLOW, through his appointed representative,[2] prays that a writ of certiorari issue to review the constitutionality of the decisions in this probate case to effect a "*California vacatur*" of the appellate rulings for all, except the litigants, by declining supreme court review but directing "nonpublication" of the opinions.

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2. The Petitioner, who died on January 5, 1995, acts through his appointed representative, Karyn L. Story, in bringing this petition. See, footnote "1" *supra* at page ii.

MATTERS TO BE REVIEWED

Petitioner respectfully requests review of the following:

(1) The decision by the California Supreme Court to abstain from reviewing the appellate opinion which presented a significant "separation of powers" conflict over whether the legislative or the judicial branch of government has the last word on an intestate succession law -- and the allied decision -- not to direct publication of said appellate opinion (so as to, in that way, eliminate the conflict). [*infra,* App 2, Appendix "B"].

(2) The unreported (nonpublished) opinion of the California Court of Appeal, Fourth District, Division Two, which decrees -- a contradictory legislative pronouncement and a prior order to "depublish" such a holding, notwithstanding -- that "the children of an adopted child are entitled to inherit from their biological grandmother." [*infra,* App 3-20, Appendix "C" at App 17].

(3) The decision of said lower appellate court not to certify its opinion for publication and not to grant the requests for its publication (thereby effectively immunizing said opinion against review by the higher court). [*infra,* App 21-22, Appendix "D"].

(4) The underlying requests for publication and objections thereto which set out how and why "nonpublication"(*vacatur*) of the opinion, if upheld, would lead to unequal and unfair application of the law and would be a denial of the constitutionally guaranteed "equal protection" right. [*infra,* App 23-32, Appendix "E"].

(5) The subject California Rules of Court, rules, 976-979, which allows California's court to limit, without any explanation, (if not to cut off completely) a petitioner's First Amendment right of equal access to the state's highest court for a redress of grievances, and permits that court to effect an unfair and unequal application of the law by making aberrant appellate decisions disappear -- for all except the parties -- by denying the petition for review but directing *nonpublication* of the opinion, all without having to reveal the reasons. [*infra,* App 33-36, Appendix "F"].

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JURISDICTION

Upon Petitioner's application, on March 11, 1997, the Honorable Sandra Day O'Connor graciously granted Petitioner an extension of time to file the instant petition to and including April 17, 1997 [*infra,* App 1, Appendix "A"]. The California Supreme Court filed its order denying appellant's petition for review of the appellate decision in question and denying the requests to officially publish (report) said opinion on December 18, 1996 [*infra,* App 2, Appendix "B"].

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 which, in relevant part, reads:

> (a) Final judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed by the Supreme Court by writ of certiorari... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises substantial concerns over fundamental First Amendment rights of petition for a redress of grievances and of equal access to the courts which involve both the procedural and the substantial "due process" provision, and, also, the "equal protection" provision of the Fourteenth Amendment to the United States Constitution, and it presents a challenge to the constitutional strictures that prescribe the duty of adjudication and demand a "separation of powers" between the legislative and judicial branches of government.

The constitutional and statutory provisions involved are as follows:

U.S. CONSTITUTIONAL PROVISIONS

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition Government for redress of grievances.

Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS OF CALIFORNIA

The following statutory provisions of California are involved in this case:

Constitution of the State of California, Art. III, Sect. 1.

> The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.

California Rules of Court for Publication of Appellate Opinions, rules 976-979.

California Rules of Court for the Publication of Appellate Opinions -- the *"California vacatur"* law -- forms the primary focus of this request for certiorari. As such, said rules, together with the enabling portions of the California Constitution, are set forth in their entirety in Appendix "F" at App 35-37. Please refer to said Appendix.

CALIFORNIA'S INTESTATE SUCCESSION PROVISIONS

The sections of the California Probate Code (former and current) which are the subject of the underlying dispute over succession rights to the decedent's estate, are as follows:

Former California Probate Code, Section 6408 -- (enacted) Stats. 1990 ch.79, (repealed) Stats. 1993 ch.529

> **§6408. Parent and Child relationship.** (a) A relationship of parent and child is established for the purpose of determining

intestate succession by, through, or from a person in the following circumstances:

(1) Except as provided in subdivisions (b), (c), and (d), the relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents.

(2) The relationship of parent and child exists between an adopted person and the person's adopting parent or parents.

(b) The relationship of parent and child does not exist between an adopted person and the person's natural parent unless both the following requirements are satisfied:

(1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabiting with the other natural parent at the time the child was conceived and died before the birth of the child.

(2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(c) Neither a natural parent nor a relative of a natural parent (except the issue of the child or a wholeblood brother or sister of the child or the issue of that brother or sister) inherits from or through the child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent. *{Enacted Stats. 1990 -- repealed Stats. 1993}*

Current California Probate Code -- Parent and Child Relationship (enacted) Stats. Sept. 1993 ch. 529; operative Jan. 1, 1994

§ 6450. Circumstances Under Which Relationship Exists for Intestate Succession. Subject to the provisions of this chapter, a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person in the following circumstances:

(a) The relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents.

(b) The relationship of parent and child exists between an adopted person and the person's adopting parent or parents. *{Stats. 1993}*

Comment: *[of the California Law Revision Comm'n.] Section 6450 continues subdivision (a) of former 6408 without substantive change. The language "[s]ubject to the provisions of this chapter" is placed into the introductory clause because Sections 6451, 6452, and 6454 modify the relationship of parent and child between the adopted person and the person's adopting parent or parents, as well*

as the relationship of parent and child between a person and a person's natural parents. In the former 6408, application of the "except" clause was limited to the relationship of a parent and child between a person and the person's natural parents.

Section 6451. Adoption Severs Relationship; Exceptions.

(a) An adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person unless both of the following requirements are satisfied:

(1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabiting with the other natural parent at the time the person was conceived and died before the person's birth.

(2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(b) Neither a natural parent nor a relative of a natural parent, except for a wholeblood brother or sister of the adopted person or the issue of that brother or sister, inherits from or through the adopted person on the basis of a parent and child relationship between the adopted person and the natural parent that satisfies the requirements of paragraphs (1) and (2) of subdivision (a), unless the adoption is by the spouse or surviving spouse of that parent.

(c) For the purpose of this section, a prior adoptive parent and child relationship is treated as a natural parent and child relationship.

***Comment** [of the California Law Revision Comm'n.]: Section 6451 continues the substance of subdivisions (b) and (c) of former Section 6408. . . . Subdivision (b) omits the reference to the adoptee's "issue" that was in the parenthetical "except clause in subdivision (c) of the former Section 6408. The former reference to "issue" was unnecessary. The issue of the adoptee do not inherit from or through the adoptee on the basis of a parent-child relationship between the adoptee and the adoptee's parents. Rather they inherit from or through the adoptee on the basis of the parent-child relationship between themselves and the adoptee.*

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HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

It is respectfully submitted that the *"California vacatur"* law as imposed against the petitioner's interest in this case has an effect which is repugnant to the Constitution of the United States.

The appended Opinion of the Court of Appeal recites the background facts of this case [*see,* App 4-8]. Insofar as they are pertinent to the issues raised here, they are briefly stated.

In 1991, Edna Clara Reedy, a widow, died without a will leaving an estate of approximately $950,000. She was survived by two siblings and about two dozen descendants of five siblings who had predeceased her (the "Mucklows"). In 1927, before she was married, Mrs. Reedy had given birth to her only child whom she gave up for adoption to strangers, Mr. and Mrs. Smith, shortly after birth. The natural father is unknown. At age 42, Norma Collene Maddox (the "adoptee"), with three children of her own, located Mrs. Reedy. The adoptee claimed to be the child whom Mrs. Reedy had relinquished for adoption as a baby. Mrs. Reedy never formally acknowledged the adoptee was as her "child." No parent-child relationship between the two was ever established in any court of law. The only birth record of the adoptee produced at trial, certified that she was born to Mr. and Mrs. Smith.

Three separate claims for inheritance are asserted. One claim is asserted by the Mucklows who succeed to the estate *if* Mrs. Reedy left no "issue." A second claim is asserted by a grandchild of Mrs. Reedy's pre-deceased husband ("Kirk") who is entitled to half of the former community-property home, *if* the decedent left no "issue." The third claim is asserted by the three children of the adoptee (the respondents), who, professing to be Mrs. Reedy's biological grandchildren, claim the entire estate as her lawful "issue." At trial, it was conceded that the adoptee herself could not succeed to the estate because the adoption had severed the parent-child relationship.

The controversy over the effect of adoption on succession rights has reached the California Supreme Court twice already. In *Reedy I* (which did not include Kirk), the court determined who administers the estate. *Reedy II* is to determine who inherits the estate. Though no supreme court review has been granted, in December, 1993, the court "*decertified*" the opinion in *Reedy I* (ordered unpublished what the appellate court had certified for publication); that is, the high court made "*disappear from the*

official reports" the opinion that had construed California's statutory law on adoption and succession rights to mean that "the children of an adopted child inherit from their natural grandmother." [see, App 8, 16]. In *Reedy II*, the appellate court (apparently relying on the "law of the case" rule and ignoring the inherent "separation of powers" conflict in applying it)[3] reasserted its earlier holding which was "*decertified.*" Again, the high court abstained from review, but it also declined, without comment, the requests, pursuant to California Rules of Court, rule 978, to publish said resurrected holding. [*See,* App 1 and App 35-37].

The seminal fact in this case is that on September 2, 1993,

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3. In the courts below, Petitioner had vehemently argued the Legislature, by Probate Code 3, [*see*, discussion thereof in Opinion at App 10-16] *expressly directed* that its 1993 enactment is to control the subsequent determinations of this probate, and that the doctrines of *res judicata* and *law of the case* cannot be applied to resolve the issues raised in *Reedy II,* because:

1. The trial judge specifically ruled that he was making a "new determination" and was not "taking refuge in any *res judicata* theory." So, there is no "law of the case' to apply to the "new determination."[*See*, ftn. 3, in Opinion at App 9].

2. Kirk was not a party to *Reedy I*. [*See*, "Facts" in Opinion at App 7]. So, there is no "law of the case" to apply to the determinations that involve Kirk's interests, and that doing so violates "due process" rights.

3. Probate Code §3 is the legislative pronouncement that "law of the case" is inapplicable here because the Legislature intended its own "clarifications" of ambiguous statutes to prevail over whatever interpretation a court may have given to the ambiguous statute in past adjudications. Given that, Petitioner argued, it was an "abuse of discretion" for the probate court to apply the *Reedy I* construction of former Probate Code §6408, unless it were determined that the Legislature did not intend the 1993 enactment to be a "clarification" of said former code section.

4. The settled law is that "law of the case" is a procedural rule and not an inescapable doctrine. Injustice, intervening law, change in circumstances (such as the appearance of Kirk on the scene which requires the court to make a new assessment, in any event), absurdity, all factors that are present here, justify revisiting the prior ruling. *(Note: Particularly, this point is extensively briefed; however, the Opinion gives no indication why the court rejects the contention.)*

one day after the Court of Appeal had issued its opinion in *Reedy I* on September 1, 1993, -- before the opinion became final -- the California Legislature repealed the intestate succession statute that *Reedy I* had interpreted [Probate Code §6408, *supra, p.6*] and enacted in its place "clarifying" legislation which showed, unequivocally, that the judicial construction that *Reedy I* had given the statute is not the meaning that the Legislature had in mind.[4]

In *Reedy II* the court was, therefore, presented with an unavoidable "separation of powers" conflict. It was asked to decide whose pronouncement of the state's intestate succession law prevails -- the appellate court's "decertified" September, 1993, *Reedy I* decision, which concluded that:

> If the parenthetical clause in section 6408, subdivision (c) is to be given any meaning at all, it must mean that children of an adopted child are able to inherit from their (biological) grandparents.

(which holding the appellate court reasserted in *Reedy II*, (*see,* App 17), or the Legislature's, September 1993, enunciation of the law, in Probate Code §6451, which explains, in its official comment thereto, that:

> Subdivision (b) omits the reference to the adoptee's "issue" that was in the parenthetical "except" clause in subdivision (c) of the former Section 6408. *The former reference to "issue" was unnecessary.* The issue of the adoptee do not inherit from or through the adoptee on the basis of a parent-child relationship between the adoptee and the adoptee's parents. Rather they inherit from or through the adoptee on the basis of the parent-child relationship between themselves and the adoptee. (emphasis added). *{Supra, p.7}*

Additionally, the comment to §6451 expressly refers to *Reedy I* saying, "this changes the rule of *in re Estate of Reedy*, 22 Cal. Rptr. 2d 478 (1993), *petition for hearing in California Supreme Court filed."* Moreover, the legislative history also makes reference to the fact that the new enactment is a "clarifying continuation" of

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4. Appellant did not discover what the Legislature had done until after *Reedy I* had been taken up, on a petition for review, to the California Supreme Court. Upon discovery thereof, in October of 1993, Appellant promptly notified the Supreme Court of the Legislature's enactment, and that court, on December 16, 1993, "decertified" the opinion in *Reedy I*.

the former law and not a substantive change of §6408 to make clear that the Legislature had not intended former §6408(c) to mean that children of an adopted child enjoyed greater rights to inherit than does the adopted child.

Though Appellant had vigorously argued that the conflict between the Legislature's and the Court's view of this statutory law needed to be addressed -- urging that the essential question to be answered in *Reedy II* is whether the new enactment had "created new law" or merely "clarified the existing law"[5] -- the Court of Appeal declined to consider whether the 1993 enactment was a legislative "clarification" of the former §6408. It offered the explanation that:

> Appellate counsel in the prior appeal was writing letters to the Law Revision Commission urging amendment of the law, and at the same time writing letters to the Supreme Court urging that court to consider the Law Revision Commission recommendations that were being submitted to the Legislature. The same attorney, who is also counsel for an appellant in this appeal, now urges this court to apply the recently-enacted law which probably resulted, in part, from the efforts to amend the law which arose in the earlier appeal. This court should not encourage or be a party to an effort to *manipulate the statutes* (emphasis added) in order to influence the outcome of a case." [*Opinion, at App 17, (before modification*].

While it is true that said explanation for not considering the "clarification" question was removed from the final opinion by a modification order (undoubtedly because the court was made aware that counsel had not "manipulated the statutes"), the court, however, did not modify its opinion on inherent "separation of powers" conflict created by its failure to address the "clarification

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5. Under well-settled California law, when an enactment is "clarification" of a statutory law, it is to be given retroactive application by the courts because such an enactment is a legislative expression of what the true meaning of the law had always been and is not a "new" law. [e.g., *Bowen vs. Board of Retirement* 42 C.3d 572, 575; *Bolen v. Peralta Junior College Distr.* (1974) 11 C.3rd 821, 828, fn. 8; *Arcadia Redevelopment Agency v. Ikemoto* (1993) 16 CA 4th 444; *accord, Negrette v. California State Lottery Com.* (1994) 21 CA 4th 1739, 1744].

versus new law" issue.

It concludes its opinion in *Reedy II* with expressly reiterating the deciding rule of law of *Reedy I* which the California Supreme Court had "*decertified*" in 1993, saying: [App 17]

> In our opinion in appeal No. E009967 *(Reedy I)* we held that under the law as written at that time "*the children of the adopted child are entitled to inherit from their biological grandmother.*" In this opinion we have concluded that the question of distribution of the estate should be decided under the law that existed in 1991, *that is, the law under which our earlier decision was rendered.* [emphasis added].

Although the appellate tribunal had originally (in its tentative opinion) indicated its intent to certify the *Reedy II* opinion for publication, the court changed its mind after hearing oral argument. The decision not to publish effectively immunized the opinion from review by the California Supreme Court since that court traditionally grants review *"only to secure uniformity of decision or to settle an important question of law."* [California Rules of Court, rule 29(a)]. With the 1993 recodification of the law, the question of what effect adoption has on succession rights [Probate Code §6451] was settled by the Legislature. If the *Reedy* opinion, which contradicts the legislation, were "unpublished," the uniformity of California law is not assailed, and there would be no need to review the aberrant opinion.

Of course, under California's "standards for publication of opinions," Rule of Court, 976(b) [App 33], the *Reedy* opinion is eminently publishable. That the opinion met those standards, on several grounds, was urged on the court, pursuant to California Rule of Court, 978 [App 36], by Attorneys, Bunt, Hekman and Senter [App 23-28]. And, recognizing that publication would greatly increase the chances of obtaining judicial review of the opinion, Respondents' counsel, Pinto and Savord "objected" to publication [App 29-34]. The appellate court declined to certify its opinion for publication and transmitted the matter to the Supreme Court for final determination, as mandated by rule, 978 [App 21].

In taking this unavoidable "separation of powers" conflict and

threatened violation of "equal protection of law" to the California Supreme Court, Petitioner reminded that high court that at stake is not only the distribution of Mrs. Reedy's million-dollar estate but also, the estates of countless numbers of decedents who died in the period of January 1985 to December 1993 when the questioned statute was in effect. Petitioner argued that, if the appellate construction of the repealed statute were correct -- that during those years the statute entitled the issue of adoptees to inherit from their natural grandparents -- then, under California probate law, *all* such potential heirs have a right to be notified of their possible heirship. If so, Petitioner argued, it would mean that the personal representative in all such probates must investigate whether the decedent ever had a child that was given up for adoption and will need to determine, and locate, any possible issue of such adoptees. Petitioner, moreover, reminded the high court that resolving the presented conflict by merely "not publishing" the decision would violate the "equal protection" right, referring, in a footnote, to the "objections" that Respondents had interposed to publication, saying:

> Respondents argue that their case is "special" because it presents unusual facts and suggest that, if the decision in the case remained unpublished, the impact of the law on other probates would be minimal. Respondents forget that "special" applications of the law violate the "equal protection" guarantee of the Constitution.

On December 18, 1996, the Supreme Court of California denied the petition for review (*Justice Baxter being of the opinion that review should have been granted) [App 1], thereby letting the appeal decision stand for the litigants, but also denied the requests for publication, thereby once again, abolishing all precedential value of that appeal decision and *obliterating* its effect on like-situated persons.

Petitioner respectfully submits that "dodging" the unavoidable "separation of power" conflict presented by this appeal through imposing a *"California vacatur"* on the rightful precedential effect of the opinion is repugnant to the United States Constitution.

___o___

REASONS FOR GRANTING CERTIORARI

Petitioner urges this Court to grant certiorari in order to settle the important question, and give guidance to the states and courts of this land, on the extent and limits to which courts have an obligation to decide a cause that is apparently within their jurisdiction and/or have discretion to eliminate their apparent jurisdiction, and/or have discretion to decline adjudication for reasons other than those grounded in constitutionally sound jurisdictional statutes.

Discussing the judicial obligation, Chief Justice Marshall in *Cohens v. Virginia,* 6 Wheat. (19 U.S.) 264 (1821) said: "*We have no more right to decline jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, exercise our best judgment, and conscientiously perform our duty.*"

Since those words were spoken, the business of courts has, of course, increased many fold. The rarified world of Justice Marshall no longer exists. Today's courts are all drastically overburdened. Of necessity, numerous prescriptions for curtailing jurisdiction have been fashioned. Rightfully so. Certainly, prudence and fairness should guide the court in molding its discretion to decline to exercise jurisdiction. However, "the power to deny decision" cannot be unlimited. The Constitution must be the bounds. This case presents a clear example where the bounds of the Constitution were repeatedly exceeded, on all levels of the judicial process, to avoid having to decide. Though the problem is endemic, a case like this reaches the Court rarely. The Court should take the opportunity to speak on an issue of such grave importance.

In exercising the discretion to decide or not to decide, (which is, of course, also a decision), the courts have traditionally been guided only by the mandate to "do what is fair." Is there more?

THE MANDATE TO "DO WHAT IS FAIR"

The "abstention doctrine" is the usual procedural tool that courts use to reduce the need to decide. Generally, under this doctrine, adjudication may be avoided whenever a decision not to decide is "fairly possible." The rule of *law of the case*, relied on by the appellate court below, is an example. Its standard limits are reason, fairness and prudence. [Petitioner respectfully submits, and has argued below, that this case presents a paradigm of that abstention device strained too far. The appellate court's decision not to decide whether the 1993 legislative enactment of California's intestate succession law was "new" law or a "clarification" of the law that existed when Mrs. Reedy died is grounded neither in reason, fairness, nor judicial prudence. In fact, its abstention from that necessary determination has pitted the court into an assured "separation of powers" conflict with the Legislature from which there can be escape only through further judicial review. That escape route to further judicial review was effectively blocked when the court decided not to certify its opinion for publication.

Though the California procedure of eliminating review jurisdiction by simply rendering the suspect decision *invisible* through directing its nonpublication is a practice that is not known in the federal system, the use of *vacatur* as a tool for managing judicial caseloads was recently reviewed by this Court in several cases. The decisions the Court reached in those cases underscore the constitutional infirmities in the "*California vacatur*"procedure.

Of course, the most effective way of eliminating the need to adjudicate a dispute is to have the parties enter into a voluntary settlement. For that reason, in all jurisdictions, settlements are greatly encouraged. Whether the *"vacatur"* power is available to federal courts to facilitate settlements was reviewed in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. ___ No. 93-714 (1994) where the Court held, in a unanimous opinion, that, absent exceptional circumstances, a settlement of the parties is not a proper ground to vacate a prior judgment in the case,

whether that judgment was rendered in the trial court or an appellate court.[6]

Remanding a cause presented for review to the court from whence it came for new decision, without reviewing the old, is a discretionary abstention technique that was newly embraced by this Court in *Lawrence v. Chater*,__ No.94-9323 (1996) and, *Stutson v. United States*,__ *No. 94-8988*. The extensive discussion on the extent and limits of the federal "GVR" -- the power to *grant* certiorari, *vacate* the judgment below, and *remand* for further decision -- in which this Court engaged in *Lawrence v. Chater*__ No.94-9323 (1996), is instructive. As said, it highlights the problems with the "*California vacatur*" and points to the fact that further exposition on the limits of the power to decline adjudication is needed. In its *per curiam* opinion, with a strong dissent from Justice Scalia, the Court explained that:

> In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration . . . *and alleviates the "[p]otential for unequal treatment"* that is inherent in our inability to grant plenary review of all pending cases raising similar issues. [cit. omitted]. We fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

The Court went on to caution that:

> all are agreed that our GVR power should be exercised sparingly. This Court should not just GVR a case because it finds the opinion, though arguably correct, incomplete and unworkmanlike.

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6. In contrast, California has legitimized the practice of stipulated reversal in *Neary v. Regents of University of California* (1992) 3 C.4th 273 and, moreover, has a strong presumption in favor of granting the parties' request for reversal.

From the Court's above referenced discussions of the *vacatur* power it is obvious that an essential ingredient of that power is the mandate to "do what is fair."

THE "CALIFORNIA VACATUR" IS INHERENTLY UNFAIR AND MARKS AN ABRIDGMENT OF THE FUNDAMENTAL RIGHTS OF PETITION, DUE PROCESS AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE CONSTITUTION

By "not publishing" or "depublishing" or "decertifying" a court of appeal opinion, without granting review, the California Supreme Court lets the decision stand with regard to the parties but eliminates its precedential value. The court has exercised this power with increasing frequency. Although the decertification of an opinion is not supposed to be a reflection of the court's opinion regarding the correctness of the decision or statements in the opinion [Cal. Rules of Ct., Rule 979(e) at App 37], its increasing use of decertification orders shows that it is being used as an expedient method of shaping the development of case law without adding to the court's burdened docket.

The Court's power to decertify court of appeal opinions is virtually unlimited. Cal. Const., art. VI, § 14, [App 38] provides simply that court of appeal opinions shall be published "as the Supreme Court deems appropriate," whereas Cal. Rules of Ct., Rule 976(c)(2), provides that "[a]n opinion certified for publication shall not be published ... on an order of the Supreme Court to that effect." Although a request for the decertification of any court of appeal decision must be made within 30 days after the decision becomes final with regard to the court of appeal [Cal. Rules of Ct., Rule 979(a), there is no comparable limitation on the Court's power to decertify an opinion on its own motion [Cal. Rules of Ct., Rules 979(d)]. As a result, the Supreme Court has frequently ordered the decertification of court of appeal opinions long after they have become final and have been published initially in the advance sheets of the official reports [*eg, Estate of Reedy(ReedyI)*

was published for over three months, at 18 CA 4th 769, before it was depublished; *People v. Marshall* (Sept. 5, 1989), published at 213 CA3d 1113, ordered decertified on June 26, 1990].

Moreover, though, the Cal. Const., art. VI, § 14,[at App 38] provides that: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated," it is the court's practice not to state reasons for its orders concerning publication or depublication of appellate opinions. The high court has, furthermore, declined all invitations (and there have been many) to speak on its *vacatur* practice. When, how, and why the "*California vacatur*" law is applied remains a locked secret.

What the Supreme Court meant by decertifying the *Reedy I* opinion was a hotly disputed, highly material, issue in *Reedy II* with direct relevance to the application of "law of the case" rule on which the *Reedy II* decision was, apparently, based. The question was expressly raised in the petition for review. The high court remained silent and gave no reasons for its decision not to direct publication of the Opinion in *Reedy II,* as was requested, three times, pursuant to Rule of Court, 978. [Appendices B, D, and E, App 2; 21-32].

The Opinion eminently qualified for publication, on several grounds, under the standards provided in Rule of Court 976(b) [App 33] for publication as urged by the three requests for publication. In fact, the Opinion required publication to ensure Fourteenth Amendment "equal protection" for those who would be, or might be, affected by the *law of Reedy* (that is, all children of adoptees whose natural grandparents died during the years when the *Reedy law* was in effect and all those interested in such estates). The decision not to publish the Opinion can only be explained as an effort to abolish the need for review and thereby to cut off Petitioner's access to the court.

Petitioner respectfully submits that such action impermissibly infringes his fundamental First Amendment right of petition for redress of grievances and of equal access to the court and due process guaranteed by the Fourteenth Amendment. *See, California Motor Transport Co. v. Trucking Unlimited,*404 U.S. 508, 510

(1972) ("The right of access to the courts is indeed but one aspect of the right to petition") *also see, Lewis v. Fletcher*__No. 92-1511 (1996), which reaffirms that the "fundamental right of access to the courts is well-established," which includes the right of equal access to appellate courts where the state chooses to provide appellate review.

THE REFUSAL TO ADJUDICATE THE "SEPARATION OF POWERS" CONFLICT IS AN UNCONSTITUTIONAL ABSTENTION OF JUDICIAL DUTY WHICH DEPRIVED PETITIONER OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS

There is not more basic, more momentous, a duty that falls upon the highest court of any state (or the land) than the duty to decide a conflict that pits the realm of the courts against the realm of the Legislature. In our American form of constitutional government, based as it is on the concepts of equality before the law, inviolate individual rights and freedoms, and the separation of powers between the three co-equal branches of government, the decision to abstain from deciding a cause presented for decision has grave consequences. If the only branch of government whose affirmative duty it is to adjudicate questions dealing with conflicts of power between the branches declines to rule, our constitutional form of government cannot function.

Though deciding not to decide is certainly the rule of supreme court review, it is respectfully submitted that the California Supreme Court (or any court of last resort) possesses no discretion to abstain from adjudicating a presented conflict when, as here, an appellate opinion has established a previously unrecognized rule of law in an area that belongs exclusively to the Legislature (such as the purely statutory realm of determining the rules of intestate succession), and the Legislature has made its intent on the matter known and has expressly disavowed the contradictory court-created rule. Such a case presents a direct and unavoidable conflict between the domain of the Courts and the domain of the

Legislature, and in such cases, the highest court is always the interested principal. The inherent conflict raises the constitutional duty to mediate conflicts between the judiciary and the Legislature to the highest level. Thus when presented with a request to adjudicate a "separation of power" issue between the judicial and legislative branches of the government, the high court is obligated to exercise its jurisdiction and review the matter with the utmost good faith toward the Legislature.

If suspect appellate decisions are not faithfully scrutinized for violations of the judicial power to interpret the laws, and not make them, the supreme court empowers its judicial subordinate with the means to overthrow the power of the legislature to make the laws. All legal fiction (that denial of review is not a determination of the correctness of an appellate opinion) aside, when the California Supreme Court declines review, it has, in fact, made the decision to allow the rule of law pronounced in the opinion (right or wrong) to control the rights of, at least, the parties to the case. So, when the high court remains silent by declining to review an errant appellate decision, it clothes itself with the judicial authority of its subordinate.

The "nonpublication" power gives the California Supreme court a second, very potent, discretionary tool with which it can limit the reach of the decisions that subordinate appellate courts make. By refusing to publish an opinion, or by ordering it depublished, the effect of the decision is limited to the parties to the decision. Obviously, opinions that determine cases based on already established rules of law need not be published because the rule already exists. But, when an opinion establishes a previously unrecognized rule, or alters or modifies an existing rule, such opinion should be (and historically is required to be) published so that all others can be guided by it, and the newly created rule is not a "judicial secret."

If the Supreme Court decides not to publish, and/or to depublish an appellate opinion that conflicts with a published legislative pronouncement on the same subject, the legislative rule remains the operative one for all except those who are party to the

case for which a different rule of law was adjudicated. Unless there is a sufficient "rational reason" for not reviewing the case and for not publishing the opinion, the selective "unequal" application of a law through discretionary nonreview and discretionary nonpublication is clearly unconstitutional.

Petitioner respectfully submits that there is no sufficient "rational reason" for the "*California vacatur*" law. In its present form and in its application to this Petitioner it is repugnant to the Constitution of the United States.

—o—

28 U.S.C. sect. 2403 (b) may be applicable

CONCLUSION

WHEREFORE, for these various reasons, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

April 17, 1997

Respectfully submitted,

ERIKA W. SENTER
Attorney at Law
4199 Campus Drive
Suite 700
Irvine, California 92715
tel (714) 854-5309
fax (714) 854-4897

Counsel of Record
for Petitioner
Lawrence B. Mucklow

APPENDIX "A"
EXTENSION OF TIME TO FILE WRIT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 11, 1997

Ms. Erika W. Senter
4199 Campus Drive
Suite 700
Irvine, CA 92715

Re: Lawrence B. Mucklow
v. Sherry E. Farrow Harvey, et al.
Application No. A-651

Dear Ms. Senter:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on March 11, 1997, extended the time to and including April 17, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, CLERK
By Loretta S. Ruffin
Assistant Clerk

[Notification List-omitted]

APPENDIX "B"
SUPREME COURT OF CALIFORNIA ORDER

Fourth Appellate District, Division Two, No E 014711
S056527
IN THE SUPREME COURT OF CALIFORNIA

Estate of Edna Clara Reedy
SHERRY E. FARROW HARVEY, et al.
Respondents,

vs.

LAWRENCE B. MUCKLOW, et al.,
Appellants.

SUPREME COURT
FILED
Dec 18, 1996

Robert Wendruff, Clerk

Deputy

Petition for review DENIED.
The requests for an order directing publication of the opinion are denied.

Baxter, J. is of the opinion the petition should be granted.

R. M. GEORGE

Chief Justice

APPENDIX "C"
CALIFORNIA COURT OF APPEAL OPINION

FILED
SEP 10, 1996

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

Estate of EDNA CLARA REEDY,
Deceased.

SHERRY E. FARROW HARVEY, et al.,
Petitioners and Respondents,

v.

E 014711
(Super.Ct.No.P61523)

LAWRENCE B. MUCKLOW et al.,
Objectors and Appellants.

OPINION

APPEAL from the Superior Court of Riverside County. William H. Sullivan, Judge. Affirmed.

Erika W. Senter, Ralph Hekman and Norbert Bunt for Objectors and Appellants.

George Hugh Savord and Richard J. Pinto for Petitioners and Respondents.

We are asked to decide whether the probate court erred when it applied the law in effect at the time of decedent's death to determine who was entitled to distribution of decedent's estate. Appellants challenge a probate order, issued in 1994, holding that under the law in effect at the time of decedent's death in January

1991 respondents were entitled to distribution of decedent's entire estate. Respondents are the children of decedent's natural daughter who had been given up for adoption by decedent as an infant. We affirm.

FACTS

In 1927 Edna Clara Mucklow, who was 20 years old and not married, became pregnant. She was sent from her native Nebraska to California to stay with her brother until the child was born. Following the birth of her daughter, whom she named Norma Collene, she gave the child up for adoption. Edna Clara Mucklow subsequently married Mr. Reedy. They had no children, although Mr. Reedy had one son from a previous marriage. Mr. Reedy died in 1985. Edna Clara Reedy died in 1991 leaving an estate of about $950,000.

Norma Collene was raised by a loving adoptive family, the Smiths. She married Mr. Farrow and had three children, Sherry E. Farrow Harvey, Thomas O. Farrow and James E. Farrow, who are respondents in this proceeding. Norma Collene divorced Mr. Farrow and married Mr. Maddox; in these proceedings she is generally referred to as Norma Collene Maddox or just Collene Maddox. Norma Collene Maddox died in 1993, while these proceedings were pending.

In the early 1970's, when she was in her 40's, Norma Collene Maddox needed a passport and asked her adoptive mother for her birth certificate. She was shown her adoption papers, which contained the name Mucklow, and through that unusual name she located her birth mother, Edna Clara Reedy. Norma Collene Maddox and Mrs. Reedy were pleased to find each other and continued to see each other at least several times a year, and during some periods every week, until Edna Clara Reedy's death in 1991.

Mrs. Reedy left no will. Following her death, a petition for letters of administration was filed by Karyn Story, who claimed to be a niece of Mrs. Reedy and to have been nominated by Mrs. Reedy's brother. In her petition, Story listed the heirs of Mrs. Reedy, comprising two surviving siblings and about two dozen

descendants of five siblings who had predeceased Mrs. Reedy.

The following month a petition was filed by Sherry E. Farrow Harvey (Harvey) on behalf of herself and her two brothers, claiming that she was entitled to letters of administration as the representative of the only grandchildren of Mrs. Reedy. Her petition included a nomination by Norma Collene Maddox.

Harvey based her claim on Probate Code section 6408.5 subdivision (b), which at the time of Mrs. Reedy's death in January 1991 stated, "Neither a parent nor a relative of a parent (except for the issue of the child or a wholeblood brother or sister of the child or the issue of such brother or sister) inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent." (Stats 1985, ch. 982,§22, p.3119.)

The trial court concluded that the parenthetical clause "except for the issue of the child" carved out an exception to the general rule that the relative of a parent of a child who has been adopted out cannot inherit from or through the adopted child. Accordingly, the trial court concluded that "Sherry E. Farrow Harvey, as the granddaughter of decedent and within the exception set out in Probate Code § 6408.5(c) is entitled to letters of administration."[1] On appeal from that order this court reviewed the statutes and the case law surrounding the question and affirmed the trial court's

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1. The trial court cited Probate Code section 6408.5, subdivision (c), which addresses the question of who should inherit from the child born out of wedlock. In *Estate of Reedy* (Oct. 1, 1993) E009967 [nonpublished opinion] (hereinafter, appeal No. E009967), this court construed Probate Code section 6408.5, subdivision (b), the text we quote here, which addresses the question of who should inherit from or through a child who has been adopted. By the time the court's opinion in appeal No. E009967 was issued that latter code section had been renumbered section 6408, subdivision (c).

The clauses contained in both sections and construed by both the trial court and this court in appeal No. E009967 --"(except for the issue of the child . . .)" -- are identical. In this opinion we will cite the code sections that existed at the time of Mrs. Reedy's death in January 1991.

decision. Appellant's petition for review by the California Supreme Court was denied, but the Supreme Court ordered that the opinion not be officially published.

The petition for review was denied December 1993 and remittitur in the case was issued by this court December 22, 1993. In January 1994 appellants filed a motion in this court to recall the remittitur in light of legislative changes to the Probate Code effective January 1, 1994. This court denied the motion and no further action was taken in that appeal.

In November 1991, while the appointment of Harvey as administrator was on appeal, Harvey and her two brothers (who will be referred to collectively as the Farrows) petitioned the probate court asking the court to determine who was entitled to distribution of the estate. They argued that they were entitled to inherit under the statute as it had been interpreted by the trial court in the earlier proceeding. They contended that under the exception contained in the parenthetical clause of Probate Code section 6408.5, subdivision (c), respondents were able to inherit through their mother even though she had been born out of wedlock. The Farrows quoted the Law Revision Commission comments to the 1985 amendments to Probate Code sections 6408 and 6408.5, which stated that: "In addition, subdivision (c) is amended to permit the issue of the child or a brother or a sister of the child...to inherit from or through the child even though the requirements of paragraphs (1) and (2) of subdivision (c) [relating to acknowledgment and support of a child born out of wedlock by the natural parent] are not satisfied." (18 Cal. Law Revision Com. Rep. (1986) p. 303) The Farrows argued that they exactly fit the legislative exception carved out in Probate Code section 6408.5, subdivision (c), and that "The three grandchildren are exempted from the general rule of non-inheritance by statutory exception, and thus should be found to be the sole heirs of the decedent."

Lawrence Mucklow, Mrs. Reedy's brother, subsequently filed with the court a statement of interest asking the court to divide the estate into seven shares to be distributed to the two surviving siblings of Mrs. Reedy and to the issue of the five predeceased

siblings of Mrs. Reedy.

In December 1991 Vivienne Lynn Kirk filed a statement of interest in the estate alleging that she was the granddaughter and only living descendant of Mr. Reedy, Mrs. Reedy's husband who died in 1985, and that under Probate Code section 6402.5, subdivision (f), she was entitled to one-half of the community real property held by Mr. and Mrs. Reedy at the time of Mr. Reedy's death.[2] Under that section, heirs of a predeceased spouse are entitled to claim an intestate share of the community property only if there is no surviving spouse or issue of the decedent; thus, although the Mucklows and Kirk had competing interests, both were asking the court to determine that the children of Norma Collene Maddox were not the issue of Mrs. Reedy for purposes of distribution of her estate.

The proceedings to determine who was entitled to distribution of the estate were apparently stayed pending resolution of the appeal of the order to issue letters of administration to Harvey. Following denial of review by the Supreme Court in appeal No. EOO9967, counsel for Lawrence Mucklow filed an amended trial brief stating that "The basic dispute between the parties concerns the question of what law is applicable" to the determination of who, among the three sides to the probate, inherits the estate.

Mucklow went on to note that on September 27, 1993, less than four weeks after the filing of this court's opinion in appeal No. EOO9967, the Legislature had repealed the code sections construed in that opinion and had replaced them with Probate Code section 6451, which took effect January 1, 1994. Under the amended section the clause referring to issue of an adopted child, which was of critical importance to this court's earlier opinion, had been deleted.

Following extensive briefing and a hearing held in April 1994 on the Farrows' petition to determine who was entitled to distribution, the probate court took the matter under submission.

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2. In the petition for letters of administration filed by Harvey the real property was estimated to have a value of $300,000.

A formal order was duly entered holding that: "1. Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow are issue of Edna Clara Reedy, so that Probate Code Section 6402.5[3] does not apply, and are entitled to distribution, equally, of the entire estate of Edna Clara Reedy, under Probate Code Section 6408 in effect on her date of death, because that estate vested in them on the date of death, subject only to administration.

"2. Norma Colleen [sic] Maddox was born out of wedlock to Edna Clara Reedy, and was, after her adoption out, acknowledged by Edna Clara Reedy, as her child; and Edna Clara Reedy, after said adoption, contributed to the support and care of Norma Colleen [sic] Maddox, so that Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow as relatives of Edna Clara Reedy, to-wit: grandchildren, would be entitled to inherit her estate through their mother, Norma Colleen [sic] Maddox, if Probate Code Section 6452 were to be followed."

Mucklow and Kirk each have filed an appeal from the order of the probate court determining the persons to whom distribution should be made.

DISCUSSION

On appeal[4] Mucklow repeats the contentions he presented in

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3. As we have discussed above, Probate Code section 6402.5 concerns the rights of the heirs of a predeceased spouse to a share of the community property. As we have also noted, that section applies only if there is no surviving spouse or issue of the decedent.

4. On July 13, 1995, this court reserved ruling on a request by Mucklow to take judicial notice of certain documents relating to the Law Revision Commission tentative recommendations for amendment to Probate Code 6452, distributed by the commission for comment in March 1995. Included in the materials was a letter from appellate counsel for Mucklow to the staff counsel of the Law Revision Commission, written in December 1993, setting out, among other things, counsel's view of what was wrong with this court's

(continued...)

the trial court, again clearly stating his arguments that (1) the Farrows were not "heirs" of Mrs. Reedy under code language "that is in effect now"; (2) the former language of the code was not the language to be applied to the determination before the court now; (3) the previous order granting letters of administration to Harvey did not determine the right to inherit; (4) the doctrines of law of the case and collateral estoppel "do not apply and do not foreclose reexamination of the Farrow's right to inherit within the meaning of Probate Code section 6451 [as amended effective January 1, 1994]"; and (5) the Farrows cannot take the estate as "issue" of Mrs. Reedy within the meaning of Probate Code sections 50, 6402, or 6402.5, and no other code section makes provision for such "special" claims. Kirk joins in the arguments made by Mucklow, and she too argues that the Farrows failed to establish that they were "issue" of Mrs. Reedy.[5]

(...continued)

decision in appeal No. EOO9967.

In light of the fact that we are not basing our decision on Probate Code section 6452 as it was written after January 1, 1994, we do not believe that the materials presented in the request for judicial notice are relevant to this appeal. We therefore deny Mucklow's motion for judicial notice of those documents.

5. Appellants also contend that respondents have failed to establish that Norma Collene Maddox was in fact the child given up for adoption by Edna Clara Reedy in 1928.

If Norma Collene Maddox was not the natural child of Edna Clara Reedy, Sherry E. Farrow Harvey would have had no greater claim to letters of administration than Karyn Story. (See Prob. Code, § 8461, listing priority for appointment as administrator.) The court's ruling in the earlier proceedings depended on the factual determination that Harvey and her brothers were the grandchildren of decedent, and that Norma Collene Maddox was the natural daughter of Mrs. Reedy. That finding was not challenged in the previous appeal. In the interest of bringing finality to these proceedings we are inclined to deem that issue to have been conclusively resolved in the earlier proceeding.

Appellants emphasize, however, that the trial court chose not to "take refuge in a res judicata theory" on the issue of whether Norma Collene Maddox was the child given up by Edna Clara Reedy, and that instead the court agreed

(continued...)

One issue appears to us to be dispositive of the case before us: What law should be applied to the determination of heirship? We agree with the trial court that the applicable law is the law in effect at the time of Mrs. Reedy's death in January 1991. We therefore affirm the trial court's order.[6]

At the time of the trial court's decision in 1994, Probate Code section 3, subdivision (b), provided, with regard to the application of new or amended code sections, that "This section governs the application of the new law except to the extent otherwise expressly provided in the new law." (Stats 1989, ch. 21, § 1, p. 72.)

Probate Code section 3 went on to state, in subdivision (c): "Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person,

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(...continued)

to review the evidence submitted by the parties. The court then held that "Norma Colleen [sic] Maddox was born out of wedlock to Edna Clara Reedy, and was, after her adoption out, acknowledged by Edna Clara Reedy, as her child." We find that the trial court's determination on this issue was supported by substantial evidence in the record and we affirm.

6. We recognize that in the order denying the motion to recall the remittitur in appeal No. EOO9967, filed February 2, 1994, this court included the statement: "We decline to give the parties an advisory opinion on the other issues they raise, except to note that the trial court should decide those issues under the law in effect at the time of its decision, and we will consider the correctness of the trial court's decision in any future appeal."

At the hearing on the motion to determine heirship the trial court indicated that it viewed this court's statement in the earlier order as dicta, and that it did not view itself as bound by the statement. We are of the same opinion. At the time of the order denying the motion to recall the remittitur, the issue of which law should apply to determinations of heirship was not before this court.

Another possibility is that this court meant no more than that the trial court should apply the law that applies. Under that interpretation, the trial court determined that the "law in effect at the time of its decision" was the law in effect at the time of Mrs. Reedy's death in January 1991.

commencement of a proceeding, making of an order, or taking of an action." (Stats 1989, ch. 21, § 1, p. 72.)

Probate Code section 3, subdivisions (g) and (h) stated: "(g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its repeal or amendment by the new law.

"(h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference." (Stats 1989, ch. 21, § 1, p. 73.)

The probate court was unequivocal in deciding what law should apply to the determination of heirship, holding that the Farrows were "issue" of Mrs. Reedy and should take "under Probate Code Section 6408 in effect on her date of death, because that estate vested in them on the date of death, subject only to administration."

Under subdivision (h) of section 3 of the Probate Code the probate court is given the discretion to apply pre-existing law "to the extent reasonably necessary" to mitigate the "substantial interference" of the new law with "the rights of the parties or other interested persons in connection with an event that occurred...before the operative date" of the new law. Our review of the probate court actions under this section would be to determine whether the court abused its discretion. (Stats 1989, ch. 21, § 1, p. 73.) '''The test is not whether we would have made a different decision had the matter been submitted to us in the first instance. Rather, the discretion is that of the trial court, and we will only interfere with its ruling if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge reasonably could have reached the challenged

result.' (*Estate of Billings* (1991) 228 Cal. App.3d 426, 430....)" (*Estate of Hammer* (1993) 19 Cal. App.4th 1621, 1634.)

It cannot be doubted that the new law interfered substantially with the rights of the beneficiaries in the present case. Under the law applicable at the time of Mrs. Reedy's death--as that law was interpreted by the probate court in the earlier proceeding, affirmed by this court, and not disapproved by the Supreme Court--the Probate Code contained an exception that permitted the issue of a child who had been adopted out to inherit from the natural parents of the adoptee. Under that law the Farrows stood to inherit Mrs. Reedy's entire estate. There also does not appear to be any question that under Probate Code section 6451, in effect at the time of the 1994 probate court order determining who was entitled to distribution, the Farrows would not have been able to inherit from Mrs. Reedy. The clause relating to "issue of the [adopted] child" had been eliminated from the exception construed by this court in the earlier appeal. Application of the new law would have completely divested the Farrows of their interest in the considerable estate of Mrs. Reedy. It is clear that such a result would constitute "substantial interference" with the rights of the parties to these proceedings, and the trial court's decision to apply the old law was an appropriate exercise of the court's discretion.

In making its ruling, however, the trial court did not simply exercise its discretion under section 3 of the Probate Code. It held instead that the "estate vested in [the Farrows] on the date of [Mrs. Reedy's] death, subject only to administration." At the time of the hearing on the motion the court made its views plain: "I don't want to preempt Counsel in any way, but it seems to me that the basic question to be argued at this point is whether the law of succession in effect at the date of Ms. Reedy's death is the one that governs entitlement to distribution or...whether some change in the law that was made after that time governs distribution. And frankly, I have to be sold on the proposition that [it is] some change in the law after the date of death that governs, because my upbringing and experience as well as the cases cited after 6400 of the Probate Code seem to me to be fairly conclusive that the rights of heirs

vest as of the date of death of the ancestor. But I'll be glad to hear your try to persuade me to the contrary...."

The traditional law in California has been as stated by the trial court. "Under our law of succession the title to the estate of a person dying intestate vests in the heirs, whether known or unknown, immediately upon his death. [Citations.]" (*State v. Miller* (1906) 149 Cal. 208,210; accord, *Estate of Wellings* (1925) 197 Cal. 189, 194.)

Probate Code section 300, codified in 1931, stated, in relevant part: "When a person dies, the title to his property, real and personal, passed to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate" under the rules of intestate succession." (Stats 1931, ch. 281, § 300, p. 599.)

Probate Code section 300 did not effect any change in the traditional rule: "The decedent died intestate, and upon his death title to the property became vested in his heirs (Prob. Code, sec. 300) whether such heirs were known or unknown...." (*Johns v. Scobie* (1939) 12 Cal.2d 618, 623 [citing *State v. Miller*, supra, 149 Cal. 208].) "Under Probate Code section 300, whatever property passes to a testator's heirs by reason of intestacy vests as of the date of the testator's death. [Citations.]" (*Estate of Roulac* (1977) 68 Cal. App.3d 1026, 1032, fn. omitted.) "Under the law of intestate succession, title vests in an heir immediately on death and no assent or acceptance is required to fix title in the heirs. [Citation.]" (*Estate of Taylor* (1973) 33 Cal. App.3d 44, 49.)

The courts also addressed the effect of a change in the law on the vesting of such an interest: "It is, of course, settled that when a decedent dies intestate, his heirs, both known and unknown, acquire an interest in his estate by operation of law at the moment of death, which interest cannot be divested by subsequent changes in the law of succession. (*Johns v. Scobie* (1939) 12 Cal.2d 618, 623...;*Estate of Wellings* (1925) 197 Cal. 189, 194....)" (*Mannheim v. Superior Court* (1970) 3 Cal.3d 678.691.)

Former Probate Code section 300 was repealed effective July 1, 1989; however, the substance of the provision was reenacted in

Probate Code section 7000, where it remains. At the time of the hearing in 1994, section 7000 stated, in relevant part, that subject to administration, "title to a decedent's property passes on the decedent's death...to the decedent's heirs as prescribed in the laws governing intestate succession."

Appellants ask us to interpret the language of Probate Code section 3, quoted above, to mean that the Legislature intended that some law other than the law in effect at the time of Mrs. Reedy's death should be applied to distribution of her estate. They ask us to apply Probate Code section 6451, which took effect January 1, 1994, retroactively to govern the distribution of the estate, notwithstanding the fact that under Probate Code section 7000 the interests in the estate vested at the time of Mrs. Reedy's death in January 1991.

"It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, p. 393.) "In spite of the fact that the two points are frequently confused into one, the question of the constitutionality of retroactive legislation and the question of the intention of the Legislature to make a statute retroactive are distinct questions. The latter question is not a federal one, but one of interpretation of a state statute...." (*Ware v. Heller* (1944) 63 Cal. App.2d 817, 821.)

Thus, the question before us is whether the Legislature intended that the provisions of section 3 of the Probate Code, directing application of the new law, should be held to prevail over Probate Code section 7000, regarding vesting of title upon the decedent's death. If we decide that the Legislature did intend that the new law should be applied, then we will have to consider whether application of the new law in these circumstances is constitutional.

There is a "well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1218.) In the present case, the intent of the Legislature as expressed in the

language of Probate Code section 3, is not unequivocal. Subdivision (c) of that section contains the Delphic statement that "the new law applies on the operative date to all matters governed by the new law." The fact that the trial court is given the discretion by Probate Code section 3, subdivision (h), to apply the former law indicates that the Legislature was approaching the issue of retroactivity with some caution. Moreover, the Legislature has given the court discretion to take into account, in deciding which law to apply, whether the new law would substantially interfere with the rights of the parties. We interpret this as indication of an intent on the part of the Legislature to respect the rights that were vested under the old law.

Nor does the language of other code sections strengthen the position of appellants. Probate Code section 6414, subdivision (a), provides that this "part" of the code (i.e., part 2 of division 6 of the Probate Code, dealing with intestate succession) is to apply only where decedent died on or after January 1, 1985. By legislation enacted in 1983, major revisions were made to the Probate Code, to take effect January 1, 1985. Probate Code section 6414 was added in 1984, effective January 1, 1985, making it clear that the revised code sections were not to apply to the estates of decedents who died before the effective date of the revisions. Thus, the Legislature at that time expressed a particular intent not to give retroactive effect to the new provisions governing intestate succession.

There is no such provision, however, regarding retrospective application of the 1991 and 1993 code amendments. The absence of such a provision could indicate an intent that the subsequent amendments should govern all cases involving decedents who die after January 1, 1985, even in those cases in which the decedent dies before the amendments take effect. Equally plausible, however, is the conclusion that the legislators were familiar with the provisions of Probate Code section 7000 regarding the vesting of interests, and, having stated the general rule regarding retroactive application of the intestate succession laws, they trusted the discretion and judgment of the probate court judges to apply

the new law only when it did not conflict with the traditional rule.

We conclude that if the Legislature intended to change a rule as well established as the rule at issue in this case then it had an obligation to state its intent clearly and unequivocally and to address and amend the code sections, such as Probate Code section 7000, which would be vitiated by the change. Our review convinces us that the Legislature has not expressed a clear intent that courts should apply law other than the law in effect at the time of decedent's death to the question of who is entitled to inherit the estate of one who dies without a will. Thus we do not reach the question of whether a retrospective law would have been constitutional.

Appellants appear to approach this case under two theories: (1) either the amendments effective in 1994 did not change the law but merely clarified it, in which case the earlier ruling of this court was wrong and should now be corrected by an order distributing the estate to the parties who were always entitled to receive it; or (2) the amendments effective in 1994 are a change in the law but they demonstrate that the Legislature had never intended to do what this court found it had done in enacting the earlier law, so the amendments reflect the true intent of the Legislature and therefore should be applied. Neither argument can prevail.

The earlier ruling of the probate court may have been incorrect, but neither this court nor the Supreme Court thought so. No matter what the Legislature may have thought it was doing in enacting those sections, the final interpretation of their effect is left to the courts. Thus, appellants' first argument must fail; even if our first opinion was "wrong," it was binding as to the matters decided. Evidence that the Legislature had intended something else is, at this point, irrelevant.

Appellants' second argument is equally unavailing. They argue that the change in the language of the statutes demonstrated an intent on the part of the Legislature to change the outcome in the earlier appeal, but only to conform to the intent that always existed. They argue that now that the Legislature has made its intent clear, this court should rely on the later enactment to

interpret the true meaning of the old law and should apply the new enactment.

We have discussed above our reasons for declining to apply the new law. This case, too, provides a clear example of the protections afforded by limitations on the retroactive application of new law. Appellate counsel in the prior appeal was writing letters to the Law Revision Commission urging amendment of the law, and at the same time writing letters to the Supreme Court urging that court to consider the Law Revision Commission recommendations that were being submitted to the Legislature. The same attorney, who is also counsel for an appellant in this appeal, now urges this court to apply the recently-enacted law which probably resulted, in part, from the efforts to amend the law which arose in the earlier appeal. This court should not encourage or be party to an effort to manipulate the statutes in order to influence the outcome of a case.

The last argument made by appellants is that the Farrows have failed to establish that they are "issue" of Mrs. Reedy as that term is defined in the Probate Code. They contend that the Probate Code thus contains no provision for distribution of the estate to them since Probate Code section 6402, which governs intestate distribution of the estate, relies on established lines of succession.

In our opinion in appeal No. EOO9967 we held that under the law as written at that time "the children of the adopted child are entitled to inherit from their biological grandmother." In this opinion we have concluded that the question of distribution of the estate should be decided under the law that existed in 1991, that is, the law under which our earlier decision was rendered. That being so, our earlier decision that the Farrows could inherit from Mrs. Reedy is law of the case and is not now open to further review. Moreover, in the present case the probate court made the specific finding that "Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow are issue of Edna Clara Reedy." That finding is sufficient to overcome any inconsistency raised by the contention that Norma Collene Maddox was no longer the "issue" of Mrs. Reedy following the adoption so her children could not be the

"issue" of Mrs. Reedy. We conclude there is no merit to appellants' contention on this issue.

The fact that the Mucklows were not nominally part of the earlier appeal does not mean that they are not bound by this court's prior ruling in the same proceeding on an issue of law. The interests of the Mucklows were represented by Karyn Story in the earlier appeal, and the question of whether the Farrows could inherit from their biological grandmother was fully and vigorously litigated.[7]

DISPOSITION

The order determining that respondents are entitled to distribution of Mrs. Reedy's estate is affirmed. Costs on appeal to be borne by appellants.

NOT FOR PUBLICATION

RAMIREZ
P.J.

We concur:

WARD
J.

McDANIEL
J.*

---

7. As we have stated, appellate counsel for Story in the previous appeal is now representing the Mucklows in this appeal.

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

FILED
OCT 03, 1996

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

Estate of EDNA CLARA REEDY,
Deceased.

SHERRY E. FARROW HARVEY, et al.,
Petitioners and Respondents,

v.

LAWRENCE B. MUCKLOW et al.,
Objectors and Appellants.

E 014711
(Super.Ct.No.P61523)

MODIFICATION OF OPINION AND ORDER DENYING PETITION FOR REHEARING

The opinion filed in this case on September 10, 1996, is modified as follows:

The second full paragraph of page 18 {*here, the first full paragraph of page App 17*} is stricken in its entirety and replaced with the following:

"We have discussed above our reasons for declining to apply the law enacted in 1994 to distribution of the estate of a decedent who died in 1991, and we need not restate them here."

Except for the modification of language hereinabove set forth,

the opinion previously filed remains unchanged. The modification does not effect a change in the judgment.

The petition for rehearing is DENIED.

NOT FOR PUBLICATION

RAMIREZ
P.J.

We concur:

WARD
J.

McDANIEL
J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the chairperson of the Judicial Council

APPENDIX "D"
APPEAL COURT'S TRANSMITTAL LETTER PURSUANT TO CALIFORNIA RULES OF COURT, RULE 978(a) UPON DECLINING THE REQUESTS FOR PUBLICATION

[seal]

Court of Appeal

FOURTH APPELLATE DISTRICT, DIVISION TWO
303 WEST FIFTH STREET
SAN BERNARDINO, CALIFORNIA 92401

CHAMBERS OF
MANUEL A. RAMIREZ
PRESIDING JUSTICE

909-383-4443

October 3, 1996

The Honorable Ronald M. George
Chief Justice
California Supreme Court
303 Second St., South Tower
San Francisco, California 94107-1117

Re: Estate of Edna Clara Reedy, deceased
No. E014711, Superior Court No. P-61523

Dear Chief Justice George:

Pursuant to California Rules of Court, rule 978a, there is transmitted herewith a copy of our opinion in the above matter, together with all requests for its publication and all objections thereto.

[*continued on next page*]

It is not published because, in our view, the opinion does nothing but restate settled legal principles.

Respectfully yours,

[signed]
Manuel A. Ramirez
Presiding Justice

MAR:mm
enclosures
cc: Erika w. Senter, Esq., 4199 Campus Dr., Ste. 700, Irvine, CA 92715
Norbert Bunt, Esq., 601 No. Parkcenter Dr., Ste. 103, Santa Ana, Ca 92705
George Hugh Savord, Esq., 41530 Enterprise Cir. So., Ste. 207, Temecula, CA 92390
Richard J. Pinto, Esq., 103 Avenida Del Mar, 2nd Fl., San Clemente, Ca 92672
Ralph K. Hekman, Esq., 4046 Chestnut St., Riverside, CA 92501

APPENDIX "E"
PUBLICATION REQUESTS AND OBJECTIONS THERETO PURSUANT TO RULE 978 OF THE CALIFORNIA RULES OF COURT

[Bunt Letter - requesting publication]

LAW OFFICES OF
NORBERT R. BUNT
PROFESSIONAL CORPORATION
601 NORTH PARKCENTER DRIVE, SUITE 103
SANTA ANA, CALIFORNIA 92705
(714) 558-8823

September 20, 1996

To the Honorable Justices of the
Court of Appeal For the State of California
Fourth Appellate District, Division Two
303 W. Fifth Street
San Bernardino, CA 92401

Re: Estate of Reedy - Case No. E0124711
Request for Publication re California Rule of Court 978(a)

Your Honors:

In reference to this Court's Opinion rendered in the above-entitled matter, it is respectfully requested that said Opinion be certified for official publication. This request is based in part upon the following factors:

1. The Court's Opinion establishes a new rule of law for all intestate estates of decedent's[*sic*] with dates of death from January 1, 1985 through December 31, 1993.

[*continued on next page*]

2. This Court's Opinion involves a legal issue of continuing public interest.

As a probate attorney, it is the considered opinion of the undersigned that the Court's decision has far reaching implications to the intestate estates of all decedent's [sic] who died between January 1, 1985 through December 31, 1993. This Court's decision will necessitate that the personal representatives of all intestate estates investigate whether the decedent ever had an adopted out child, and to locate and determine whether said adopted out child ever had any issue.

Since the law traditionally has been that a parent/child relationship is severed by an adoption, this decision now allows the issue of adopted out children to inherit from the natural parent of the adopted out child. This decision is clearly an important change in the law and should well warrant the official publication of this Court's Opinion.

Your consideration to this request is respectfully requested.

Sincerely,

[s]NORBERT R. BUNT

NRB/mb

[proof of service omitted]

[Hekman Letter - requesting publication]

LAW OFFICES
RALPH K. HEKMAN

4046 CHESTNUT STREET
RIVERSIDE, CALIFORNIA 92501
AREA CODE 909
TELEPHONE 684-3235
FAX 684-2432

September 23, 1996

To the Honorable Justices of the
Court of Appeal For the State of California
Fourth Appellate District, Division Two
303 W. Fifth Street
San Bernardino, CA 92401

Re: Estate of Reedy - Case No. EO124711
Request for Publication re California
Rule of Court 978(a)

Your Honors:

I concur with the letter request of Norbert R. Bunt, Esq., that the Opinion rendered in the above-entitled matter be certified for official publication, and with each of the reasons stated in his letter in support thereof.

Your consideration to the request for certification for official publication is respectfully requested.

Sincerely,
[s] Ralph K. Hekman

RKH/k
[proof of service omitted]

[Senter Letter - requesting publication]

ERIKA W. SENTER

Attorney at Law

UNIVERSITY TOWER
4199 CAMPUS DRIVE
SUITE, 700
IRVINE, CALIFORNIA 92715
tel (714) 854-5309
fax (714) 854-4897

September 25, 1996

TO THE HONORABLE JUSTICES OF THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO
303 West Fifth Street
San Bernardino, CA 92401

RE: ESTATE OF REEDY E014711
REQUEST FOR PUBLICATION OF OPINION
PURSUANT TO CRC RULE 978

Your Honors:

With reference to the requests for certification of the Opinion for official publication made in this matter by Attorneys Norbert R. Bunt and Ralph K. Hekman, I herewith join that request.

In addition to all the reasons for requesting publication stated by Mr. Norbert R. Bunt, with which I concur fully, there are the following additional reasons for publication of this Opinion:

1. The Opinion makes a significant contribution to the legal literature by reviewing Probate Code, section 3, which has not yet been reviewed by any published opinion.

2. The Opinion criticizes existing legislation and recommends

changes, or clarification, in Probate Code, section 3 to resolve ambiguities or perceived conflicts with Probate Code, sections 6414 and 7000. To wit, at pages 16-17 of the Opinion, the court notes that section 6414 expressly makes the revised intestate code sections inapplicable to estates where the decedent died before 1985 and writes: "The absence of such a provision [regarding the 1991 and 1993 code amendments] could indicate an intent that subsequent amendments should govern all cases involving decedents who died after January 1, 1985, even in those cases where the decedent dies before the amendments take effect. ... We conclude that if the Legislature intended to change a rule as well established as the rule at issue in this case then it had an obligation to state its intent clearly and unequivocally and address and amend the code sections, such as Probate Code section 7000, which would be vitiated by the change."

3. The Opinion creates an apparent conflict in the law in that it applies the doctrine of "law of the case" notwithstanding the fact that there has been an intervening change in the law. The rule of law most often followed concerning the application of "law of the case" is that an intervening change in the law renders the procedural rule "law of the case" inoperative and justifies a revisit to the earlier ruling.

4. The Opinion is one of first impression concerning a legal issue that is of great continuing public interest. To wit, what effect a Supreme Court "decertification" order has on the "law of the case" rule.

For all these reasons, I join Mr. Bunt and Mr. Hekman in their request for publication of this Opinion and also respectfully request such publication.

Respectfully,

EWS/wts
[s]ERIKA W. SENTER
[proof of service omitted]

[Pinto Letter - objecting]

LAW OFFICES OF
RICHARD J. PINTO
103 AVENIDA DEL MAR, SECOND FLOOR
SAN CLEMENTE, CALIFORNIA 92672
TELEPHONE: (714) 366-9111
FAX; (714) 366-5962

September 30, 1996

TO THE HONORABLE JUSTICES
OF THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO
303 W. Fifth Street
San Bernardino, CA 92401

RE: ESTATE OF; EDNA CLARA REEDY
Appellate No. E-014711

RESPONDENTS' OBJECTIONS TO APPELLANTS' REQUESTS FOR PUBLICATION OF OPINION PURSUANT TO CRC RULE 978

Your Honors:

Appellants in the above-reference appeal have formally requested certification of the Opinion for official publication by and through their respective counsel. Respondents object to the Requests for Publication on the following bases:

1. The Opinion does not involve a legal issue of continuing public interest, inasmuch as the singular facts involved in the Estate of Reedy and issues of law applied thereto are almost completely confined to the unusual sequence of events related in the Opinion and thus would most probably not have any significant impact on any other past or present action.

2. Appellants' argument in their Requests for Publication that this

"Court's decision has far reaching implications to the intestate estates of all decedent's (sic) who died between January 1, 1985 through December 31, 1993", in the undersigned's opinion, is not only wholly inaccurate, but was in essence, and by direct implication, the same argument presented to the Hon. Judge Sullivan during the heirship trial, one of the very same arguments made and rejected in Reedy I to this Court and the Supreme Court, and now again thrust forward a second time based on the very same set of facts and laws at issue.

3. The effect and structure of the Opinion cannot be said to make a significant contribution by reviewing development of a common law rule, constitution provision, statute or other written law which could otherwise be effectively applied to other cases.

4. The Opinion cannot be argued to resolve nor create any apparent conflict in the law, rather, the Opinion evidences the Court's conviction that the Legislature did not express a clear intent that courts should apply law other than the law in effect at the time of the decedent's death to the question of who is entitled to inherit the estate of one who dies without a will. Thus, no review of the question as to whether a retrospective law would have been constitutional is even at issue, and publication would not advance any test of an issue not now relevant.

5. The Opinion does not modify nor criticize any existing Probate Code section, it merely applies the law this Court deems effective as it applies to this case. In Reedy I, neither this Court nor the Supreme Court ruled that the earlier ruling of the probate court was in error, and therefore, that matter being resolved in the prior appeal, leaves the interpretational effect of this Opinion directed to existing law which has been applied without any modification nor criticism of another rule of law. This Court has analyzed the effects of Probate Code §§3 and 7000 to a particularized scenario of facts set forth in Reedy. This Court has not, as Appellants argue, criticized existing legislation, but rather has applied that legislation it has deemed, in its judicial province, to be applicable. This same judicial function is inherent in most appeals, wherein one side argues applicability of one or multiple code sections, while the other side contends another rule of law should prevail.

6. The Opinion does not establish any new rule of law, it simply applies the existing law at the time of death to the facts attendant thereto.

Appellants' contention that this Court's Opinion creates an "apparent conflict in the law in that it applies the doctrine of 'law of the case' notwithstanding the fact that there has been an intervening change in the law" is the very same contention and argument Appellants' made in Reedy I, and now renew presently. Such a contention is non-meritorious because it does not accurately describe the effect of the Opinion, which does no such thing.

7. The Opinion does not apply an existing rule to a set of facts significantly different from those in any other published opinion.

Your consideration of Respondents' Objection to the Appellants' Requests for Publication is respectfully submitted.

RICHARD J. PINTO
Attorney at Law

RJP:kee
[proof of service omitted]

[Savord Letter - objecting]

GEORGE HUGH SAVORD
A PROFESSIONAL LAW CORPORATION
ATTORNEYS AT LAW

GEORGE HUGH SAVORD

WELLS FARGO BANK BUILDING, SUITE 207
41530 ENTERPRISE CIRCLE SOUTH
TEMECULA, CALIFORNIA 92590
(909) 676-2202
FAX # (909) 676-2222

September 30, 1996

To The Honorable Justices
of The Court of Appeal
For the State of California
Fourth Appellate District, Division Two
303 West Fifth Street
San Bernardino, California 92401

Re: **ESTATE OF: EDNA CLARA REEDY**
Appellate No. E-014711

RESPONDENTS' OBJECTIONS TO APPELLANTS' REQUESTS FOR PUBLICATION OF OPINION PURSUANT TO CRC RULE 978

Your Honors:

This office and Mr. Richard J. Pinto represent Respondents in the above captioned appeal. I adopt by reference and join the objections submitted to you this date by Mr. Pinto relative to Appellants' requests for certification of the Opinion for official publication.

Your Opinion on this appellate case concerns distinct facts, and you have held that the law

in effect at the time of decedent's death applied to determine the persons entitled to distribution of decedent's estate. It clearly appears that your Opinion is constrained to the facts and law of the case, and the affect(*sic*) concerns only the Appellants and Respondents.

"One of the functions of the preparation of a formal written opinion is to provide communication with people generally, since the appellate opinion is almost the sole mean of such communication by Appellate Justices." Witkin, Manual on Appellate Court Opinions (1977) §38, p. 64.

This case has no precedential value because it adds nothing to the body of general law of public interest, which is regrettable. Your Opinion does not establish a new rule of law or alter or modify an existing rule. It does not resolve or create an apparent conflict in the law. The case does not involve a legal issue of continuing public interest, nor does it criticize existing law. The Opinion will not make a significant contribution to legal literature, however urged for publication by Appellants.

Thus, the Opinion should not be published. California Rules of Court, Rule 976.

Respectfully submitted,

GEORGE HUGH SAVORD

GHS/mls

[proof of service omitted]

APPENDIX "F"
CALIFORNIA RULES OF COURT FOR PUBLICATION OF APPELLATE OPINIONS AND ITS ENABLING PROVISIONS

California Rules of Court, Introductory Statement

The Judicial Council is established under article VI, section 6, of the Constitution of California, and is given various powers and responsibilities to improve the administration of justice. ... *All of the California Rules of Court have the force of law.* Under its authority granted by article VI, section 6, of the Constitution to "make recommendations to the courts," the Judicial Council has adopted "Standards of Judicial Administration Recommended by the Judicial Council" ("standards").

_____o_____

Rules for Publication of Appellate Opinions

(Adopted by the Supreme Court of the State of California, effective January 1, 1964, pursuant to the authority contained in California Constitution, Article VI, Section 14; and Government Code Section 68895.)

Rule 976. Publication of Appellate Opinions.

(a) **[Supreme Court]** All opinions of the Supreme Court shall be published in the Official Reports.

(b) **[Standards for Publication of Opinions of Other Courts]** No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by

reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

Amended Nov. 11, 1966; Jan. 1, 1972; Jan. 1, 1983.

(c) **[Publication Procedure]**

(1) **[Courts of Appeal and Appellate Departments]** An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) **[Supreme Court]** An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

Amended Nov. 11, 1966; Jan. 1, 1972; Jan. 1, 1983.

(d) **[Superseded Opinions]** Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part. *Relettered Jan. 1, 1972; amended Jan. 1, 1983; May 6, 1985.*

(e) **[Editing]** ... {*omitted as not relevant*} ...

Rule 976.1. Partial Publication.

(a) **[Partial Publication Authorized]** A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

Adopted Jan. 1, 1983.

(b) **[Other Rules Applicable]** For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a

published opinion, and the unpublished part as an unpublished opinion.

Adopted Jan. 1, 1983.

(c) [Copy to Reporter of Decisions] One extra copy of both the published and unpublished parts of the opinion shall be furnished by the clerk to the Reporter of Decisions.

Adopted Jan. 1, 1983; amended Jan. 1, 1984.

Rule 977. Citation of Unpublished Opinions Prohibited;

(a) **[Unpublished Opinions]** An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) **[Exceptions]** Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) **[Citation Procedure]** ... *{omitted as not relevant}* ...

Adopted Jan. 1, 1974; amended Jan. 1, 1983.

(d) **[Opinions Ordered Published by Supreme Court]** An Opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable.[1]

Adopted May 6, 1985.

Rule 978. Requesting Publication of Unpublished Opinions.

(a) **[Request Procedure; Action by Court Rendering Opinion]** A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the

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1. Any citation to the Court of Appeal opinion shall include reference to the grant of review and any subsequent action by the Supreme Court.

opinion. The request shall be made promptly by a letter stating concisely why the opinion meets one or more of the publication standards. The request shall be accompanied by proof of its service on each party to the action or proceeding in the Court of Appeal. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

Adopted July 1, 1975; amended Jan. 1, 1983; July 1, 1992.

(b) **[Action by Supreme Court]** When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The court shall send notice of its action to the transmitting court, each party, and any person who has requested publication.

Adopted July 1, 1975; amended Jan. 1, 1983.

(c) **[Effect of Supreme Court Order for Publication]** An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

Adopted July 1, 1975.

Rule 979. Requesting Depublication of Published Opinions.

(a) **[Request Procedure]** A request by any person for the depublication of an opinion certified for publication shall be made by letter to the Supreme Court within 30 days after the decision becomes final as to the Court of Appeal. Any request for depublication shall be accompanied by proof of mailing to the Court of Appeal and proof of service to each party to the action or proceeding. The request shall state concisely reasons why the opinion should not remain published and shall not exceed 10 pages.

Adopted July 1, 1990.

(b) **[Response]** The Court of Appeal or any person may, within 10 days after receipt by the Supreme Court of a request for depublication, submit a response, either joining in the request or stating concisely reasons why the opinion should remain published. Any response shall not exceed 10 pages and shall be accompanied by proof of mailing to the Court of Appeal, and proof of service to each party to the action or proceeding, and person requesting depublication.

Adopted July 1, 1990.

(c) **[Action by Supreme Court]** When a request for depublication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion depublished or deny the request. The court shall send notice of its action to the Court of Appeal, each party, and any person who has requested depublication.

Adopted July 1, 1990.

(d) **[Limitation]** Nothing in this rule limits the court's power, on its own motion, to order an opinion depublished.

Adopted July 1, 1990.

(e) **[Effect of Supreme Court Order for Depublication]** An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

Adopted July 1, 1990.

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ENABLING PROVISIONS IN CONSTITUTION OF CALIFORNIA

Constitution of the State of California, Art. VI, Sect. 6. The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, 3 judges of courts of appeal, 5 judges

of superior courts, and 5 judges of municipal courts, each appointed by the Chief Justice for a 2-year term; 4 members of the State Bar appointed by its governing body for 2-year terms; and one member of each house of the Legislature appointed as provided by the house. . . . To improve the administration of justice the [Judicial] council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute. ...

Constitution of the State of California, Art. VI, Sect. 12.

(a) The Supreme Court may, before decision, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction.

(b) The Supreme Court may review the decision of a court of appeal in any cause.

(c) The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.

(d) This section shall not apply to an appeal involving a judgment of death.

Constitution of the State of California, Art. VI, Sect. 14

The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

_____o_____

Supreme Court, U.S.
FILED
MAY 19 1997
OFFICE OF THE CLERK

No. 96-1684

In The

Supreme Court of the United States

October Term, 1996

LAWRENCE B. MUCKLOW,

Petitioner,

vs.

SHERRY E. FARROW HARVEY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD J. PINTO
Counsel of Record
LAW OFFICES OF RICHARD J. PINTO
103 Avendia del Mar
Second Floor
San Clemente, California 92672
(714) 366-9111

GEORGE HUGH SAVORD
A Professional Law Corporation
28870 Via Norte
Temecula, California 92591
(909) 676-2202

Attorneys for Respondents

71174 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

LIST OF INTERESTED PARTIES

Petitioner Lawrence B. Mucklow is the only appellant filing with this Court a Petition for Writ of Certiorari.[1]

Appellant Vivienne Lynn Kirk filed a separate appeal to the California appellate court in this action. Ms. Kirk did not file a separate Petition for Writ of Certiorari nor did she join in the present petition. Pursuant to Supreme Court Rule 13.1, Kirk's failure to file within the 90-day limit imposed and failure to comply with 28 U.S.C. § 2101(c) conclusively precludes her from further appeal.

Respondents Sherry E. Farrow Harvey, Thomas O. Farrow and James E. Farrow have been determined by the California Court of Appeal to be the decedent's (Mrs. Edna Clara Reedy) biological grandchildren, and thus the only lawful "issue" of Mrs. Reedy's only natural child, Norma Colene Maddox. (*Infra,* Appendix A, 1a-2a). It should be noted that the issues as to whether Ms. Maddox was the natural child of Mrs. Reedy and whether Respondents are her natural grandchildren were confirmed in Respondents' favor by the Court of Appeal, which stated in part that "the finding was not challenged in the previous appeal. In the interests of bringing finality to these proceedings we are inclined to deem that issue to have been conclusively resolved in the earlier appeal." [Op. at App. 9, 19].

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* For the convenience of the Court, all citations to the Opinion will be to the Opinion attached as Appendix C to the Petition for Writ of Certiorari, unless otherwise specified.

1. Lawrence B. Mucklow died January 7, 1995, two days after filing the present appeal. California Code of Civil Procedure §§ 377.30, 377.32 and 337.33 allow an action to be continued by a decedent's personal representative only if a proper declaration is filed with the Probate Court and (Cont'd)

(Cont'd)
an Order granting such authority issues. Petitioner, a deceased person, lacks standing to continue this appeal and file this petition. His personal representative or successor in interest is unknown to this Court, has not been properly appointed in accordance with applicable California law, and lacks standing to continue this action or file this petition. California Rules of Court, Rule 48, states:

> (a) **[Parties]** Whenever a substitution of parties to a pending appeal is necessary, it shall be made by proper proceedings instituted for that purpose in the superior court. On suggestion thereof and the presentation of a certified copy of the order of substitution made by the superior court, a like order of substitution shall be made in the reviewing court.

Cal. Rules of Ct., Rule 48(a).

Petitioner's legal representative never complied with California law during the pendency of the appeal nor prior to filing the instant petition, thus lacking standing to file same. Lack of standing is jurisdictional and arguably invalidates the timely filing of this Petition for Writ of Certiorari within the 90-day limitation. Petitioner's citation to California Code of Civil Procedure § 669 is unavailing since the judgment has already been entered herein and § 368.5 requires a prior order from the court to allow an action to continue in the deceased's name. That was not accomplished here. Petitioner has no legal standing since Mr. Mucklow's executor did not obtain an order of the Los Angeles County Superior Court to pursue and continue this appeal. Therefore, the Petition for Writ of Certiorari, in and of itself, is invalid on its face for lack of a proper party appellant.

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APPENDIX

Appendix A - Judgment Determining Persons Entitled to Distribution of Estate 1a

Appendix B — Appeal Court's Transmittal Letter Pursuant to California Rules of Court, Rule 978(a) Upon Declining the Requests for Publication 3a

Respondents request the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the Court of Appeal of California, Fourth Appellate District, Division Two, which held that Respondents are "issue" of Edna Clara Reedy and are entitled to distribution, equally, of the entire estate of Mrs. Reedy under Probate Code § 6408 in effect on the date of her death, because the estate vested in them on the date of death, subject only to administration. After a court trial held April 11, 1994, the judgment was affirmed by the appellate court in an unpublished opinion.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). Most, if not all, of the questions presented for review in the petition were never presented to the California courts. These newly presented arguments may not properly be considered. *See* pp. 7-12 below. As shall be seen, there are no issues presented in the Petition which satisfy the statutory criteria of Supreme Court Rule 10.1(c)'s tenets.

CONSTITUTIONAL AND STATUTORY PROVISIONS OMITTED BY PETITIONER

The issues of first impression now raised by Petitioner have escalated to include the First Amendment's guaranty of redress of grievances and the Fourteenth Amendment's stanchions of "due process" and "equal protection." Since Petitioner failed to recite the precise sections of the California Probate Code upon which the trial court ruled, and upon which the Court of Appeal affirmed Respondents' rights of inheritance, Respondents hereby incorporate those provisions in their entirety, in addition to the

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* For convenience of the Court, the former appeal in *Estate of Reedy*, 18 C.A. 4th 769, 22 Cal. Rptr. 2d 478 (1993), will be cited herein as "*Reedy I*" and the present appeal as "*Reedy II*".

Tenth Amendment to the United States Constitution, relating to those rights reserved to the states of the union.

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.

Statutory Provision Of California:

For the convenience of the Court, Respondents will refer to Petitioner's Appendix F at App. 35-37, which is a recitation of the California Rules of Court for Publication of Appellate Opinions, Rules 976-979.

California Probate Code Provisions Cited By The Court Of Appeal And Omitted By Petition From Its Petition:

The following sections of the California Probate Code are the penultimate sources of the crux of the Court of Appeal's decision (in addition to Probate Code § 6408(c) cited by Petitioner at Appendix to Petition for Writ of Certiorari, App. 4-5).

> Current California Probate Code — Preliminary Provisions and Definitions (enacted) 1990 ch. 79 14, operative July 1, 1991
>
> **§ 2. Construction.** (a) A provision of this code, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment.

(b) A provision of this code, insofar as it is the same in substance as a provision of a uniform act, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision.

3. Application of "New Law" and "Old Law.

(a) As used in this section:

(1) "New law" means either or the following, as the case may be:

(A) The act that enacted this code.

(B) The act that makes a change in this code, whether effectuated by amendment, addition, or repeal of any provision of this code.

(2) "Old law" means the applicable law in effect before the operative date of the new law.

(3) "Operative date means the operative date of the new law.

(b) This section governs the application of a new law except to the extent otherwise expressly provided in the new law.

(c) Subject to the limitations provided in this section, a new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or

circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person, commencement of a proceeding, making of an order, or taking of an action.

* * *

(g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.

(h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.

Current California Probate Code — Parent and Child Relationship (enacted) Stats. 1993 ch. 529, 1996 ch. 862

§ 6452. Child Born Out of Wedlock. If a child is born out of wedlock, neither a natural parent nor a relative of that parent, except

for a brother or sister of the child or the issue of that brother or sister, inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:

(a) The parent or a relative of the parent acknowledged the child.

(b) The parent or a relative of the parent contributed to the support or the care of the child.

Current California Probate Code - Passage of Decedent's Property (enacted) Stats. 1990 ch. 79 14, operative July 1, 1991. § 7000.

Title Passes to Devisee or Heirs. Subject to Section 7001, title to a decedent's property passes on the decedent's death to the person to whom it is devised in the decedent's last will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession.

SUMMARY OF ARGUMENT

Petitioner seeks review in this Court on three "Questions Presented" (Petition at i) and five restated "Matters to be Reviewed" (Petition at 2). His petition should be denied outright inasmuch as the California Court of Appeal unequivocally neither decided any unsettled important question of federal law which should be settled by this Court nor decided a federal question which in any manner conflicts with applicable decisions of this Court. Supreme Court Rule 10.1(c).

(1) Petitioner contends the decision by the California Supreme Court to refrain from reviewing the appellate opinion was wrong, asserting a "separation of powers" conflict has arisen, *i.e.*, whether the legislative or judicial branch of California "had the last word" on intestate succession law, and whether or not to direct publication of the appellate opinion, thus violating due process and equal protection guarantees. A ruling in favor of Petitioner regarding publication would not alter the decision in this case. Petitioner is merely seeking an advisory opinion from this Court based on an undeveloped trial court record, and on issues not properly presented on appeal.

(2) Petitioner contends that the nonpublished opinion of the California Court of Appeal, Fourth District, Division Two, which decreed that "*the children of an adopted child are entitled to inherit from their biological grandmother*" is somehow now contradictory to statutory law and is, in some unidentifiable manner, affected by the Court of Appeal's decision not to publish its Opinion. Again, Petitioner is reaching for an advisory opinion from this Court based on a vacant trial court record, and on a "*non-issue*" never presented on appeal. This Court's precedent is well established requiring parties to raise issues first on appeal to avoid unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds, and to assist this Court in its deliberations by promoting the creation of an adequate factual and legal record. *Banker Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Webb v. Webb*, 451 U.S. 493, 501 (1981).

(3) Petitioner similarly contends that the appellate court's decision not to certify its opinion for publication, which he claims "effectively immunized said opinion against review by the higher court", violates due process and equal protection. It is respectfully submitted that the California Supreme Court fully adjudicated Petitioner's Petition for Review and having weighed Petitioner's arguments, denied review. Petitioner again seeks an

advisory opinion from this Court based on an undeveloped trial court record, and on a further "*non-issue*" never presented on appeal. *Bankers Life & Casualty Co., supra,* at 79; *Webb, supra,* at 500.

(4) Petitioner contends that the California Supreme Court and the Court of Appeal rejected Petitioner's request for publication, and the resultant "nonpublication" of the Opinion results in a denial of his constitutionally guaranteed "equal protection" rights. There is absolutely no case law cited by Petitioner supporting this proposition, which is speculative at best and irrelevant at worst. This new issue ("*vacatur theory*") was never raised at trial or appellate level for adjudication, and Petitioner now seeks a determination of a non-issue on appeal.

(5) Lastly, Petitioner contends that California Rules of Court, Rules 976-979, which exact standards for publication of opinions, and gives the California Supreme Court the right to deny a party's request for publication of an opinion not certified for publication, violates his First Amendment right to petition the Government for redress of grievances. Once again, there is absolutely no case law cited by Petitioner for this claimed right, which is wholly speculative and irrelevant. Also, this new issue was never raised at the trial nor appellate level for adjudication, and Petitioner now seeks a determination of another "*non-issue*" on appeal as a matter of first impression.

STATEMENT OF THE CASE

The Court of Appeal's Opinion adequately sets forth the facts for purposes of this petition. Petitioner's recitation of the case in his petition for certiorari misstates and omits facts which are key to an understanding of the decision of the Court of Appeal.

Petitioner continues to revisit, and by *arguendo* denies, even

after the prior appellate determination (*Reedy I*), the established fact that Norma Collene (Mucklow) Maddox was the only natural living child of decedent, Edna Clara Reedy, who died intestate. It is undisputed that Norma was born out of wedlock and that her maiden name was "Edna Mucklow." On December 13, 1928, decedent gave Norma up for adoption, and Los Angeles Superior Court Judge Robert H. Scott signed the Decree of Adoption whereby Mr. and Mrs. Robert B. Smith adopted Norma, decedent's only child. Norma had three children living at the death of her natural mother, Edna Clara Reedy, whose names are Sherry E. Farrow Harvey, Thomas O. Farrow and James R. Farrow (Respondents). The court appointed Harvey administratrix of the estate of decedent after trial thereon. The court of appeal in *Reedy I* affirmed the trial court's ruling that Norma was Mrs. Reedy's only natural child and that Respondents were her natural grandchildren — hence, Letters of Administration issued to Ms. Harvey, issue of the deceased. The trial court found from a plethora of evidence that not only was Norma Mrs. Reedy's child, but that there was incontrovertible evidence that Norma was "acknowledged" by the decedent and that the decedent "contributed" to her support (Appendix A, *infra*, 1a-2a). That finding is independently determinative of Respondents' vested rights to inherit under Probate Code §§ 3(h), 6452 and 7000.

REASONS FOR DENYING THE WRIT

I.

PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A FEDERAL QUESTION WHICH WAS EVER RAISED BY PETITIONER ON APPEAL AND THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S ARGUMENTS.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been

both raised and decided in the state court below. *Yee v. City of Escondido,* 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington,* 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal). Petitioner has not met his burden of showing that the issue was properly presented to the Court of Appeal or California Supreme Court. When the highest state court is silent on a federal question presented to it, this Court has concluded that the issue was not properly presented. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987). The aggrieved party bears the burden of defeating this assumption, as recently addressed by this Court in *Adams v. Robertson et al.,* No. 95-1873 (1997); *see also Webb, supra,* at 501.

California law is consistent with federal law: arguments not presented to the trial court cannot be presented in the court of appeals. California Rules of Court, Rule 13. Likewise, even if the appellate court agrees that error occurred, it cannot reverse the decision unless it also determines that the error prejudiced the outcome of the case. California Code of Civil Procedure, § 475; *People v. Watson,* 46 C.2d 818, 836 (1981). Regarding any alleged "errors", this Court of Appeal noted in its Opinion (Op. at App 16), that "(t)he earlier ruling of the probate court may have been incorrect, but neither this court nor the Supreme Court thought so."

In this Court, for the first time, Petitioner argues he has been denied his rights under the First Amendment to petition the government for "redress of grievances" and also under the "due process" and "equal protection" provisions of the Fourteenth Amendment, alleging now that such violations give

rise to a right to petition for certiorari. (Petition at 3-4, 6-12). Petitioner did not cite in briefing the First or Fourteenth Amendments to the Court of Appeal or to the California Supreme Court at any time prior to filing this Petition.

The trial court's and the Court of Appeal's decisions rest largely on "no evidence" findings of any due process or equal protection violations. A finding of no evidence by a state trial court, affirmed on appeal, presents no issue deserving this Court's attention. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, reversed in part*, 339 U.S. 605 (1950). ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error").

Respondents respectfully oppose the Petition for Writ of Certiorari, which for the most part, accomplishes nothing but selecting a forum to assail the integrity of the entire California judiciary for making alleged holdings never in fact made, on issues never in fact presented to the California courts, and attacks the entire statutory structure of the rights of the state court to publish or not to publish appellate decisions. Petitioner has thrust Respondents into the unenviable position of researching and briefing pristine and esoteric issues never raised on appeal and never ruled on by any California court in this appeal.

Petitioner further attacks the constitutionality of California Rules of Court, Rules 976-979, for the very first time in this appeal. Constitutionality of these Rules was never raised as an issue in Petitioner's Opening Brief, Request for Re-hearing, nor Petition for Review filed with the California Supreme Court. The Court of Appeal unanimously rendered its Opinion in favor of Respondents on September 10, 1996. The Opinion was admittedly designated "NOT FOR PUBLICATION." Attorney

Senter, Petitioner's appellate counsel and Norbert R. Bunt, Petitioner's probate attorney, sent letters to the Court of Appeal requesting the Opinion be certified for official publication. Attorney Hekman, representing Kirk (not joining in the present Petition for Writ of Certiorari) also sent the Court of Appeal a letter joining in Mr. Bunt's request. (*See* App. 23-28, Appendix to Petition for Writ of Certiorari.) Respondents' counsel, Attorneys Savord and Pinto, both sent letters to the appellate court objecting to publication thereof. (*See* App 29-34, Appendix to Petition for Writ of Certiorari.)

On October 3, 1996, the Hon. Manuel A. Ramirez, Presiding Justice of the Court of Appeal, wrote a letter to the Hon. Ronald M. George, Chief Justice of the California Supreme Court, transmitting the Opinion pursuant to Rule 978a, enclosing the letters of all counsel and concluding with the following rationale for non-publication on behalf of the Court of Appeal:

> It is not published because, in our view, the opinion does nothing but *restate settled legal principles.*

Emphasis added, *infra* at Appendix B, *infra* at 3a.

One need read no further in this brief to capsulate the entirety of Respondents' position as Justice Ramirez has done. To repeat, "the opinion does nothing further but restate settled legal principles." Petitioner's Petition for Review to the California Supreme Court was totally devoid of any reference or argument regarding the issues now thrust for the first time at this Court regarding the constitutionality of California Rules of Court, Rules 976-979. In fact, the Supreme Court denied that petition on December 18, 1996, having read and reviewed all arguments pro and con "publication" that had been transmitted to it by all counsel. The California Supreme Court concluded in its ruling:

> Petition for review DENIED. The requests for an order directing publication of the opinion are denied.

See App. 2, Appendix to Petitioner's Petition for Writ of Certiorari.

Thus, it must be concluded that Petitioner has had a full and fair opportunity to be heard on the issue of publication. Based upon the statutory and case law guidelines for publication, both the Court of Appeal and California Supreme Court rejected Petitioner's demands outright. Furthermore, it is irrelevant whether the Opinion was or was not published. Petitioner evidently assumes that he would have had a greater likelihood of reversal on appeal had the Opinion been published. That is pure speculation and second guessing at this stage of appeal. Petitioner had a full and fair hearing on the merits of all of his issues raised on appeal in the Court of Appeal, and the California Supreme Court fully reviewed the Court of Appeal's Opinion. Neither the ruling of the California Supreme Court nor the Court of Appeal would have changed nor resulted in a different outcome had the Opinion been published. There is not one scintilla of evidence proffered in support of Petitioner's contention that non-publication of the Opinion somehow infringed on his constitutional rights or raised a "Federal question" regarding the validity of the California Rules of Court relating to the publication or non-publication of opinions.

If one gives credence to Petitioner's argument that the fact of non-publication somehow transforms the effect of an appellate court ruling with such negativity that the ruling is not only rendered "wrong", but also unconstitutional, havoc would be created as to the implicatory effect arising from the fact that thousands of cases have been decertified or not published over the course of California's judicial history. Furthermore, neither the California Rules of Court nor case law create a stigma to a

decertification order, as in *Reedy I*. In fact, California Rules of Court, Rule 979(e) expressly states that depublication shall *not* be deemed an expression of opinion by the Supreme Court. *Mangini v. J.G. Durand Int.*, 31 Cal. App. 4th 214, 37 Cal. Rptr. 2d 153 (1994). Petitioner's virginal issue totally lacks any merit. Petitioner's attempt to allege violation of his constitutional rights is solely based on the fact that the Court of Appeal ruled against his position, and nothing else. Nothing will change that reality, whether the Opinion had or had not been published is an irrelevancy to these proceedings.

If this Court grants certiorari and rules that all appellate courts no longer have authority to publish or not to publish or decertify cases, such a consequence will have an incredibly widespread deleterious effect on the entire judicial system. This will result in courts being forced to interpolate retroactivity and precedential effect between current and former laws as the different opinions relate to one another. This will further require re-adjudication of every case decertified or not published, and would manifest severe confusion between the scope of the judicial and legislative branches of government. The door would be opened to a "thousand year flood" of re-litigation in every state, whereby former unsuccessful petitioners and appellants will demand re-trials and re-appeals of their cases, criminal and civil. The result Petitioner is seeking could trigger the creation of an entire body of rules and laws to process resulting litigation of cases not published or decertified for publication. The outcome Petitioner applies for would be disastrous to the California legal system of jurisprudence and violative of the Tenth Amendment to the United States Constitution guaranteeing such rights as are reserved to the states.

II.

THE MANDATE OF THE COURT "TO DO WHAT IS FAIR" HAS BEEN EFFECTED BY THE CALIFORNIA COURT OF APPEAL AND SUPREME COURT BY ENFORCING THE CORRECT VESTING PRINCIPLES CONTAINED IN CALIFORNIA'S INTESTATE SUCCESSION LAWS. THE DUE PROCESS, EQUAL PROTECTION AND REDRESS OF GRIEVANCE CHALLENGES RAISED HERE BY PETITIONER FOR THE FIRST TIME HAVE NO EFFECT ON THE JUDGMENT FOR RESPONDENTS.

The constitutional directive to "do what is fair" applies to the upholding of Respondents' rights in this appeal. Petitioner's latest issue regarding the application or non-application of the court's prerogative to abstain to publish is a "red-herring" issue manufactured for its heuristic value. The Court of Appeal properly used the "law of the case" doctrine and the California legislative intent as to the impact of passage of Probate Code § 7000 to formulate its finding that Respondents were the sole heirs of the decedent. Petitioner errantly attributes that court's and the California Supreme Court's actions in refusing to publish and denying review as the easy method to abstain from decisions regarding the viability and effectiveness of the 1994 legislative enactment at issue. Petitioner misses the point and misstates the entire thrust of the Opinion. The Court of Appeal squarely confronted the issue of applicability of the statutory implications of "change of law" versus "clarification of law" head on. Petitioner wrongly attributes the catch-word "abstention" to the Court of Appeal's Opinion, when in point of fact, just the opposite occurred.

In its Opinion (*see* Op. at App. 10), the court clearly focused on the "dispositive" issue of the entire case: "What law should be applied to the determination of heirship?" While Petitioner

does not like the result of the Court of Appeal's analyses and the California Supreme Court's denial of its petition for review, there is a substantial body of law and precedence cited by the Court of Appeal which rendered a full and "fair" examination of the retroactivity of the statutory scheme involving Probate Code § 6408(c). The Court of Appeal ruled that the trial court was correct in concluding that the law applicable to the facts of this case is the law in effect at the time of Mrs. Reedy's death in January, 1991, and affirmed the trial court's order.

It should be noted that the alleged "abstention" issue now contrived by Petitioner for the initial time, though never raised previously on appeal, created absolutely no "separation of powers" conflict of any type with the California legislature. This notion is a figment of Petitioner's creative mind. There was no "escape route," referred to by Petitioner, taken by the Court of Appeal to block further judicial review by declining not to certify the case for publication. Of utmost significance, is the undeniable fact that in *Reedy I*, the Court of Appeal held that Probate Code § 6408.5(b)'s (later renumbered 6408(c)) language in the parenthetical clause "except for the issue of the child" carved out an exception to the general rule that the relative of a parent of a child who has been adopted out cannot inherit from or through the adopted child. (Op. at App. 5, 6). Relying on that determination, the trial court granted Respondent Harvey letters of administration on the basis that she was the natural granddaughter of decedent and along with her two brothers (Respondents herein), fell within the exception set forth in then Probate Code § 6408.5(c) and was entitled to letters of administration. In *Reedy I,* the appellate court held that "the children of the adopted child are entitled to inherit from their biological grandmother." The Court of Appeal determined in *Reedy II* that "the question of distribution of the estate should be decided under the law that existed in 1991, *that is, the law under which our earlier decision was rendered*" (emphasis added) (Op. at App. 17).

Petitioner feigns that the legislative changes to the Probate Code effective January 1, 1994 were ignored by the trial court, the Court of Appeal and the California Supreme Court and that Petitioner did not get fair and impartial rulings based on the new law. This is patently false and all such contentions in the Petition (Petition at 14-20) are simply *arguendo*. As the Court of Appeal pointed out, in January 1994, Petitioner filed a motion in the Court of Appeal to recall the remittitur "in light of legislative changes to the Probate Code." (Op. at App. 6). The Court of Appeal examined those amendments, determined they were *not* a "*clarification*" but a "*change*" in the law, and denied the motion. Of primary significance is the fact that Petitioner failed to file a petition for writ of certiorari in *Reedy I* on the very same issues now before this Court regarding the effect of a change in the law on Respondents' vested rights. (Op. at App. 6, 16). By failing to do so, not only is Petitioner precluded from a subsequent "second" review of a matter which is "law of the case", but more importantly should not now be allowed argue transitory non-issues relating to constitutional right deprivation by nonpublication.

More significantly, the Court of Appeal in its Opinion (Op. at App. 14-17) dispensed with any issue of the application of a retrospective law, or whether such a law would have been constitutional by the following analyses. Probate Code § 7000's application to the facts of this case is determinative of its finding that Respondents were vested with the rights of inheritance on the law in effect on the date of death of Mrs. Reedy. Citing *Evangelatos v. Superior Court,* 44 Cal. 3d 1188, 1218 (1988) for the precedent that there is a "well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent" (Op. at 14), along with the fact that the trial court is given the discretion by Probate Code § 3(h) to apply the former law over the newly changed law (because an application of the new law would "substantial interfere" with the rights of the parties), the Court of Appeal concluded that

the intent of the legislature was to "respect the rights that were vested under the old law" (Op. at 15) in favor of Respondents.

In unequivocal terms, the Court of Appeal concluded that no constitutional issues were raised or needed determination since it decided that the California legislature did not intend that the new law should be applied in this action. (Op. at App. 14-16). Furthermore, none of Petitioner's challenges here of the court's alleged violations of the due process, equal protection or redress of grievances claims made by Petitioner, are relevant because the Court of Appeal did "not reach the question of whether a retrospective law would have been constitutional." (Op. at App. 16).

III.

CALIFORNIA RULES OF COURT, RULES 976-979 ARE NOT "INHERENTLY UNFAIR" NOR DO THEY CONSTITUTE AN ABRIDGEMENT OF CONSTITUTIONAL RIGHTS.

Most recently, in *Lawrence v. Chater*, 133 L. Ed. 2d 545, 116 S. Ct. 611 (1996), this Court reaffirmed its charter under 28 U.S.C. § 2106 authorizing broad powers to grant certiorari, vacate a judgment below and remand for further decision. Petitioner's attempt to find similarities between that case and the present one are unavailing since absolutely none of the criteria used by this Court to institute a "GVR" in *Lawrence, supra,* is present on a state level in the instant action.

This Court has held that GVR was only available where there existed (1) intervening or recent developments that the Supreme Court had reason to believe the court below did not fully consider or reveal a probability that the decision below rested upon a premise that the lower court would reject if given the opportunity for further consideration; and (2) it appears that

such a re-determination may determine the ultimate outcome of the litigation. None of these factors are remotely present in this appeal.

The appropriate use of GVR in the federal context claims a dependency on all the circumstances of the case and this Court in *Lawrence, supra*, recognized that its application would be inappropriate where (1) it appears that the intervening development (such as a litigant's confession of error in certain aspects of the judgment), is part of an unfair or manipulative litigation strategy, or (2) the delay and further cost entailed in remand are not justified by the potential benefits of further consideration by the lower court. It is transparently manifest that neither of these two conditions have been met here.

The intervening development of a change in California law (vis-a-vis § 6408(c) was changed on January 1, 1994, and replaced by § 6451) had no retroactive effect on vested rights of Respondents. (Op. at App. 16-19). There have been two costly appeals in this case over a five year span brought by Petitioners. The delays and costs of remand and re-decision are not only unsupported by case law and the applicable statutes (Probate Code §§ 6408(c), 7000 and 3(h)), but are inherently unfair to Respondents' interests in achieving finality to predetermined issues.

Returning briefly to *Lawrence, supra,* that court of appeals had adopted a rationale for rejecting a petitioner's claim that the constitutionality of state paternity laws need not be considered before applying it to determine entitlement to benefits under a federal statutory scheme. The key element prompting the majority of this Court to grant GVR was the fact that the Solicitor General advised that the "Social Security Administration had re-examined the role of state paternity and intestacy laws in the Federal benefits scheme" and now interpreted the Social Security Administration "as requiring a

determination at least in some circumstances, of whether the state intestacy statute is constitutional." None of the elements presented in *Lawrence, supra,* are *even remotely* evident here. Petitioner cites no admission of error of law to possibly infringe on Petitioner's constitutional rights to a full and fair hearing. The vesting of entitlement to intestate succession under the California statutory scheme falls squarely on Probate Code §§ 6408(c), 7000 and 3(h) as discussed below, none of which were found to effect anything other than "substantial justice" by the application of the law existing at the time of death of Mrs. Reedy to the facts of this action in Respondents' favor as her "issue."

The trial court in *Reedy II* made two separate findings after trial, either of which standing on its own merits is completely determinative of the finding of inheritance rights in favor of Respondents:

(a) that because Respondents were issue of Edna Clara Reedy, they are entitled to distribution of her entire estate, under Probate Code § 6408(c) in effect on her date of death, because that estate vested in them on date of death; and,

(b) that because Ms. Maddox was born out of wedlock to Mrs. Reedy, she was, after adoption out, acknowledged by Mrs. Reedy, who also contributed to the support of Ms. Maddox. Thus, if Probate Code § 6452 were to apply, Respondents would be entitled to inherit her entire estate.

What has occurred in the instant case is exactly what the legislature contemplated happening at the time the former relevant Probate Code sections were in effect, triggering the "exception provisions" of former Probate Code § 6408.5(b). Ms. Maddox's issue (her three children) inherited *through the child* (Ms. Maddox), though the requirements of 6408.5(c)(1) and (2) were not satisfied. The statutory scheme in force on the date of

Mrs. Reedy's passing dictates these requirements do not have to be met if, as here, the adopted child leaves issue surviving decedent. The Farrows are exempted from the general rule of non-inheritance by statutory exception, and thus are sole heirs of decedent.

Former Probate Code § 6408(a) stated the relationship of parent and child is established for the intent of determination of intestate succession (1) *except* as provided in § 6408.5. Mrs. Reedy was survived by a natural child born out of wedlock, later adopted, and three (3) grandchildren. The grandchildren, (Respondents), fall definitively into the legislative exception created in former Probate Code §§ 6408(c) and 6408.5(b). Based on those code sections alone, Mrs. Reedy's grandchildren are sole surviving heirs of decedent.

Former Probate Code § 6408(c) stated in pertinent part:

> (c) Neither a parent nor a relative of a parent *(except for the issue of the child or a wholeblood brother or sister of the child or the issue of that brother or sister)* inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent.

Emphasis added.

Applying these principles, since the decedent was survived by a natural child and grandchildren, the Farrows were determined sole surviving heirs of the decedent. The decedent's child, Norma, born out of wedlock and then adopted, created the classic situation for which the statutory scheme was promulgated. There is not, and cannot be any other interpretation of these statutes. There existed no other legislative purpose for

the inclusion of these exceptions, and Petitioner's arguments to the contrary notwithstanding, Respondents are exempted from the general rule of non-inheritance by former Probate Code §§ 6408(c) and 6408.5(b).

The Court's attention is directed to the essential operative phrase in former Probate Code § 6408.5's first clause:

> *Notwithstanding* subdivisions (a) and (b) of Section 6408 . . .

(Emphasis added) wherein the legislature unequivocally created and carved out an exception to the preceding paragraphs of former Probate Code § 6408. Regarding the intent as to the 1985 amendments to Probate Code §§ 6408 and 6408.5, reference is made to *Recommendations Relating to the Effect of Adoption or Out of Wedlock Birth on Rights at Death,* 18 Cal. L. Rev. Comm. Rprts 289, 299-303 (1986) (20 Cal. L. Rev. Comm. Rprts 100 (1990)).

The interpretation tendered by Respondents has its basis as described in the Law Revision Commission comments: "In addition, subdivision (c) is amended to permit the issue of the child or a brother or a sister of the child or the issue of such brother or sister to inherit from or through the child even though the requirements of paragraphs (1) and (2) of such division (c) are not satisfied."

The trial court further buttressed the weight of its decision on the singularly relevant and dominating remaining sections of Probate Code § 3(h). That code section is *determinative* of the entire case in favor of Respondents, even if one were to challenge every prior decision of the state Supreme Court and Court of Appeal in *Reedy I* and the present action:

> 3(h). If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court *may, notwithstanding this section of the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.*

Emphasis added.

In the instant case, there is no potential for any "unequal treatment" of Petitioner as occurred in *Lawrence, supra.* Here, the probate court unequivocally decided what law should apply to the determination of heirship, finding the Respondents were "*issue*" of Mrs. Reedy and should take as such "under Probate Code § 6408 in effect on the date of her death because that estate vested in them on the date of death, subject only to administration." (Op. at App. 8).

The California legislative scheme provides the probate court the inherent power to use its wise discretion in the exercise of its equitable powers to apply pre-existing law to the extent reasonably necessary to mitigate the "substantial interference" of the new law with the rights of the parties or other interested persons in connection with an event that occurred before the operative date of the new law. (Probate Code § 6452). This is not a case of intervening legislative developments leading to a reason to believe that the appellate court did not fully consider the case, or a reasonable probability that the decision below

rests upon a premise that the lower court would reject if given the opportunity for further consideration. There is no merit to Petitioner disguising his rejection of the Court of Appeal's decision in the present attack on the so-called "*vacatur*" laws, because they are not *relevant.*

Unlike the facts in *Lawrence, supra,* re-determination will not affect the ultimate outcome of the case, so application of the GVR option is not appropriate. This Court has previously recognized the wisdom of exercising GVR "sparingly." *Alvarado v. United States,* 497 U.S. 543, 545, 111 L. Ed. 2d 439, 110 S. Ct. 2995 (1990). In the present action, there is not the factual basis nor urgency as in *Lawrence, supra,* in *Tuggle v. Netherland,* 515 U.S.__, 132 L. Ed. 2d 918, 116 S. Ct. 38 (1995) or in the factual pattern of *Robinson v. Story,* 469 U.S. 1081, 83 L. Ed. 2d 694, 105 S. Ct. 583 (1984).

The fairness doctrine precludes improper extensions of limited power without first finding error in the Court of Appeal's Opinion below. It should be noted that the present case is not a situationwhere GVR has been extended to a judgment rendered by a lower federal or state court concerning a "federal question." *See Amer v. Superior Court of California, County of Los Angeles,* 334 U.S. 813, 92 L. Ed. 1744, 68 S. Ct. 1069 (1948) and *Exxon Corp. v. Youell,* 516 U.S. __, 133 L. Ed. 2d 9, 116 S. Ct. 43 (1995).

IV.

PETITIONER'S DENOMINATED "CALIFORNIA VACATUR" STATUTES ARE NOT INHERENTLY UNFAIR AND DO NOT CONSTITUTE ANY ABRIDGEMENT OF DUE PROCESS NOR EQUAL PROTECTION GUARANTEED BY THE CONSTITUTION.

Petitioner assails the fundamental rights guaranteed under the Tenth Amendment to the United States Constitution, which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.

Petitioner seeks to use the California Rules of Court, Rules 976-979, as a *sword* to advance his speculative argument that somehow, someway, the failure of a court of appeals to publish a decision, and the actions of the California Supreme Court to depublish or decertify an opinion, would have resulted in a different decision regarding his inheritance rights under the facts of this case. Petitioner next attempts to use the very same Rules of Court as a *shield* to seemingly insulate him from opinions of the Court of Appeal in *Reedy I* and the present case (in each instance, Petitions for Review were denied by the California Supreme Court).

A litigant cannot have it both ways. Petitioner basically seeks to emasculate the prerogative of the entire California appellate court system, and the enactments of the California legislature, by inferring that expediency in the judicial system precludes the right to a full and fair hearing. As noted by the trial court in this action, and cited by the Court of Appeal, in its Opinion (Op. at App. 10), at the hearing in this instant action to

determine the heirship rights of the parties, the court viewed the Court of Appeal's statement in its Opinion in *Reedy I*, that "(w)e decline to give the parties an advisory opinion on the other issues they raise, except to the note that the trial court should decide those issues under the law in effect at the time of its decision, as we will consider the correctness of the trial court's decision in any future appeal," as "dicta" and did not view itself as bound by the statement in any respect. This Court of Appeal had two responses to the prior appellate court's statement: (1) that "[a]t the time of the order denying the motion to recall the remittitur, the issue of which law should apply to determinations of heirship was not before this court"; and (2) "(a)nother possibility is that this court meant no more than that the trial court should apply the law that applies. Under that interpretation, the trial court determined that the 'law in effect at the time of its decision' was the law in effect at the time of Mrs. Reedy's death in January, 1991."

This colloquy precisely shows the ultimate dilemma that would be effected should this Court give credence to Petitioner's assertion that every single Court of Appeal's decision and every single state Supreme Court decision be published. The appellate justices know what they are doing by depublishing, decertifying or not publishing a given opinion. To accept Petitioner's rationale for a federal rule to mandate every state court of the United States to publish every opinion ever rendered would create a nightmarish confusion of prior and current case law, and stir up a witches' brew of correct and incorrect decisions, creating an impossibility of precedential law. In brief, it is only Petitioner's opinion (no one else's) that the present Opinion "eminently qualified for publication, on several grounds" (Pet. 17). Such totally speculative statements are wholly undermined by the reality that neither the Court of Appeal in *Reedy I* and *Reedy II* or the California Supreme Court in *Reedy I* and *Reedy II* agreed with Petitioner's conclusion.

Petitioner has had equal access to the courts of California, as have Respondents — twice over the last five years. The First and Fourteenth Amendments guarantee due process not only to Petitioner, but Respondents also, lest Petitioner forgets. Rather than second-guess the Court of Appeal's and the California Supreme Court's rationale and reasoning — as has been done with consistency throughout two appeals of the same intrinsically inbred issues, Petitioner should accept the present ruling at its face value rather than attempt an harangue against the entire judicial system because a decision was not reached in his favor.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. PINTO
Counsel of Record
LAW OFFICES OF
RICHARD J. PINTO
103 Avendia del Mar, 2nd Floor
San Clemente, CA 92672
(714) 366-9111

GEORGE HUGH SAVORD
A Professional Law Corporation
28870 Via Norte
Temecula, CA 92591
(909) 676-2202

Attorneys for Respondents

APPENDIX A — JUDGMENT DETERMINING PERSONS ENTITLED TO DISTRIBUTION OF ESTATE

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA FOR THE

COUNTY OF RIVERSIDE

SUPERIOR COURT
FILED
May 23, 1994

William H. Sullivan

JUDGE OF THE SUPERIOR COURT

Estate of:

EDNA CLARA REEDY,

Deceased.

This cause came on regularly for hearing on April 11, 1994 in Department 1 of the Riverside County Superior Court, the Honorable William H. Sullivan, judge presiding. Petitioners and Respondents Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow appeared by their attorneys, George Hugh Savord and Richard J. Pinto. Petitioners and Respondents Lawrence B. Mucklow et al. appeared by their attorney, Norman R. Bunt. Petitioner and Respondent Vivienne L. Kirk appeared by her attorney, Ralph K. Hekman.

All parties having filed pleadings for determination of persons entitled to distribution of the Estate of Edna Clara Reedy, including Petitions for Determination of Heirship, and/or Statements of Interest, and/or Affidavits of Heirship; and,

evidence, both oral and documentary, having been presented by the various parties, the cause having been argued and submitted for decision,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow are issue of Edna Clara Reedy, so that Probate Code Section 6402.5 does not apply, and are entitled to distribution, equally, of the entire estate of Edna Clara Reedy, under Probate Code Section 6408 in effect on her date of death, because that estate vested in them on the date of death, subject only to administration.

2. Norma Colleen Maddox was born out of wedlock to Edna Clara Reedy, and was, after her adoption out, acknowledged by Edna Clara Reedy, as her child; and Edna Clara Reedy, after said adoption, contributed to the support and care of Norma Colleen Maddox, so that Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow as relatives of Edna Clara Reedy, to-wit: grandchildren, would be entitled to inherit her estate through their mother, Norma Colleen Maddox, if Probate Code Section 6452 were to be followed.

DATED: MAY 23, 1994

WILLIAM H. SULLIVAN

JUDGE OF THE SUPERIOR COURT

APPENDIX B — APPEAL COURT'S TRANSMITTAL LETTER PURSUANT TO CALIFORNIA RULES OF COURT, RULE 978(a) UPON DECLINING THE REQUESTS FOR PUBLICATION

[seal]
COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION TWO
303 WEST FIFTH STREET
SAN BERNARDINO, CALIFORNIA 92401

CHAMBERS OF
MANUEL A. RAMIREZ
PRESIDING JUSTICE

909-383-4443

October 3, 1996

The Honorable Ronald M. George
Chief Justice
California Supreme Court
303 Second St., South Tower
San Francisco, California 94107-1117

Re: Estate of Edna Clara Reedy, deceased
No. E014711, Superior Court No. P-61523

Dear Chief Justice George:

Pursuant to California Rules of Court, rule 978a, there is transmitted herewith a copy of our opinion in the above matter, together with all requests for its publication and all objections thereto.

It is not published because, in our view, the opinion does nothing but restate settled legal principles.

Appendix B

Respectfully Yours,

[signed]
Manuel A. Ramirez
Presiding Justice

MAR:mm
enclosures

[Notification List-omitted]

Supreme Court, U.S.
FILED
JUN 9 1997
OFFICE OF THE CLERK

No. 96-1684

In The

Supreme Court of the United States

October Term, 1996

IN RE ESTATE OF EDNA CLARA REEDY
Deceased

LAWRENCE B. MUCKLOW,
Petitioner,

vs.

SHERRY E. FARROW HARVEY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA'S SUPREME COURT AND/OR TO ITS FOURTH DISTRICT COURT OF APPEAL, DIV. TWO

PETITIONER'S REPLY BRIEF

ERIKA W. SENTER, Esq.
4199 Campus Drive, Suite 700
Irvine, California 92612-2698
tel (714) 854-5309
fax (714) 854-4897
Counsel of Record
for Petitioner
Lawrence B. Mucklow

QUESTIONS PRESENTED

1.

Does California's "nonpublication" law [California Rules of Court, rules 976-979] whereby the California Supreme Court can without granting judicial review, and without explaining its reasoning, abrogate the precedential value of an aberrant appellate opinion by making the suspect decision disappear for all except the involved litigants (the "*California vacatur*"), mark an abridgment of important fundamental rights of petition, due process, and equal protection of the laws?

2.

Where a state's legislature and its lower court of appeal have contemporaneously spoken, but inconsistently so, on a questioned matter that is governed by statutory law, not by common law, and a *California vacatur* had been issued on the inconsistent appellate opinion, does the state court of last resort violate its constitutional duty of judicial review when it abstains from adjudicating the re-asserted direct conflict between the judicial construction and legislative clarification of the questioned statute?

3.

Where statutory law, not common law, governs a state's intestate succession law, is the *separation of powers* clause of the Constitution violated by a court decree that directs distribution of an intestate estate to the children of decedent's adopted-out child when the states's legislature has unambiguously legislated that children of adoptees do not inherit from their natural grandparent because the adoption has severed the parent-child relationship through which succession rights flow?

THE INTERESTED PARTIES TO THE CASE

As previously stated in the Petition's prefatory pages [*Pet ii*], three separate inheritance claims are asserted in this probate case:

1. The claim asserted by petitioner herein, LAWRENCE B. MUCKLOW,[1] (brother of the decedent) who reflects the inheritance interests claimed by decedent's 23 siblings and nieces and nephews, who inherit *if* the decedent left neither spouse nor issue.

2. The claim asserted by co-appellant below, VIVIENNE LYNN KIRK , (grandchild of decedent's pre-deceased husband) who succeeds to half of the former community-property home, *if* the decedent left neither spouse nor issue.

3. The claim asserted by the respondents, SHERRY FARROW HARVEY, THOMAS O. FARROW and JAMES E. FARROW, (three children of an adoptee) who profess to be the decedent's biological grandchildren -- and thereon -- claim the entire inheritance as decedent's lawful "*issue.*"

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1. In their footnotes [*Pet. ftns. 1 and 2; Opp. ftn.1*], both the Petition and Respondents' Brief in Opposition report Lawrence B. Mucklow died on January 7, 1995 while this case was pending on appeal. (*Respondents wrongly state that Mr. Mucklow died "two days after filing the present appeal." In fact, the appeal was filed, on July 5, 1994, six months before Mr. Mucklow died.) As previously said [*Pet. ftn. 1*], Mr. Mucklow's still open probate expressly lists this appeal in his estate. The executor of the estate, Karyn L. Story, has elected to continue the action without seeking a change in the name of the parties during the appeal, as is permitted. California law provides that during the pendency of an appeal the trial judgment, though entered, is suspended. The statutes cited by Respondents, requiring a formal change of parties upon the death of a litigant in order to continue the action, do not apply to a "pending appeal," particularly not where probate is still open.

Respondents argue [*see, Opp. ftn. 1, p. i-ii*] that Karyn Story, the executor, lacks standing to pursue a Petition for Writ of Certiorari in Mr. Mucklow's name. The argument seems to rest on Respondents' mistaken belief that pursuing a writ of certiorari in the U.S. Supreme Court is not part of the "appeal" process and/or that Karyn Story does not have authority to continue the appeal. Respondents are wrong. California law holds that, where a writ of certiorari to the U.S. Supreme Court is taken, the "appeal is pending" until that highest legal authority has responded. See for instance, *Rosenthal vs. Wilner* (1988) 197 CA 3d 1327, 1333-1334.

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No. 96-1684

PETITIONER'S REPLY BRIEF

The Respondents' Brief in Opposition exposes not only a basic misunderstanding/misinterpretation of the Petition but underscores and highlights why the Court should grant the Petition.

Petitioner does not, as Respondents assert, seek "a federal rule to mandate every state court of the United States to publish every opinion ever rendered" [*Opp. 25*]. Rather, the Petition's focus is appropriately limited and is very reasonable. The Petition plainly states when, in Petitioner's view, the need to "publish" an appeal opinion rises to the level of a mandate [*see, Pet. 19*]:

> Obviously, opinions that determine cases based on already established rules of law need not be published because the rule already exists. *But when an opinion establishes a previously unrecognized rule, or alters or modifies an existing rule, such opinion should be (and historically is required to be) published so that all others can be guided by it, and the newly created rule is not a "judicial secret."* (emphasis added).

Moreover, Petitioner has also clearly defined the <u>limited situation</u> where, he believes, the California Supreme Court's failure to authorize publication of an appellate opinion (which is associated with a failure to grant review of the opinion[2]) rises to the level of unconstitutional conduct. [*Pet. 19-20*]. To wit:

> If the Supreme Court decides not to publish, and/or to depublish, an appellate opinion that conflicts with a published legislative pronouncement on the same subject, the legislative rule remains the operative one for all except those who are a party to the case for which a different rule of law was adjudicated. Unless there is sufficient "rational reason" for not reviewing the case and for not publishing the opinion, the selective "unequal" application of a law through discretionary nonreview and discretionary nonpublication is clearly unconstitutional.

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2. Under existing California law, all opinions of the Supreme Court are published in the Official Reports, [Cal. Rule of Court, rule 976(a); *see, Pet. App 33*], and, unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action is published. [Cal. Rule of Court, rule 976(d); *see, Pet. App 34*].

OVERVIEW: WHY THE CONSTITUTIONALITY OF NONPUBLICATION IS AN IMPORTANT QUESTION

As explained more fully hereinafter, Petitioner submits that his Petition, over California's depublication\nonpublication\nonreview practice (the "*California Vacatur*") presents the court with an actual controversy of important and ripe constitutional questions, which, to the extent possible under the California judicial system,[3] were both "pressed and passed upon below."

Petitioner believes that the proper interpretation of the constitutional and statutory authority to publish or not to publish or to "depublish" an opinion (which is necessarily allied with the authority to review or not to review the opinion) lies in the analysis of the functions of the courts of appeal and the supreme court. The appeal process has two functions, private-purpose error correcting and

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3. The California Supreme Court is, of course, the final arbiter on which decisions get published and which do not in California. No federal constitutional rights of the Petitioner were infringed upon until the decision was made not to grant review and not to publish. One legal commentator, Professor STEPHEN R. BARNETT, of Boalt Hall, *infra*, note 12, at 1055-1057 *ibid* 1084, suggests that the constitutionality of the supreme court's decision not to publish and not to grant review might be challengeable by a "petition for rehearing" of the supreme court order denying review and ordering depublication (or declining the request for publication). In the instant case, the possibility of mounting such a challenge became impossible when the remittitur issued virtually immediately, and the court of appeal declined Petitioner's efforts to stay its issuance and/or to recall the remittitur. [*See*, Reply Appendix "A" hereto -- May 1, 1997 court ruling on Petitioner's December 30, 1996 motion to recall the remittitur.]

However, in an effort to exhaust all possibilities of further remedies in California, and to create room to press the California constitutional questions that blossomed when the California Supreme Court declined review and failed to publish, Petitioner sought a rehearing on the motion. [*See*, Reply Appendix "B" hereto -- Petition for Rehearing of Motion to Recall Remittitur.]

Respondents have opposed the Petition for Rehearing. To date, there have been no additional rulings on the matter, and jurisdiction over the cause has now passed to the California Supreme Court, pursuant to California Rule of Court, rule 28(a). Under said rule, the California Supreme Court has jurisdiction over the cause for 30 days, which may be extended to 90 days upon the court's motion or a showing of good cause.

public-purpose law shaping. The primary function of the courts of appeal is error correcting. In contrast, the supreme court's primary function is that of law defining and law development. Nevertheless, the two functions are necessarily intertwined. As it adapts the common law and interprets the statutes in deciding whether a trial court has erred, the court of appeal performs the later function, the public-purpose function of law-defining and law development. And, those appeal decisions that do define, develop or shape the law, are to be published [*see*, California Rules of Court, rule 976(b) *at, Pet. App 33-34*]. Similarly, when the supreme court, in its law-shaping mode, reviews an appeal opinion to determine whether the law had been properly adapted, defined or shaped by the court of appeal below, it does so by performing an error correcting function. For the litigants in the case, it is the "court of last resort."

As Respondents correctly point out in their brief, there are constitutional strictures against making purely advisory rulings. These constraints on judicial power demand that the supreme court's public function of shaping the law occur only in the context of private error correcting. The defining power vested in the courts by the Constitution, whether California or federal, is the resolution of actual controversies as opposed to rendering advisory opinions or other rulings that have no effect on deciding a dispute between litigants.[4]

It is, therefore, highly significant, and troubling, that increasingly the law in this land is being shaped not by overt publication of the legal decisions that determine controversies between parties, but by their covert "nonpublication." Hidden, unexplained (unscrutinizeable) decisions tend to erode public confidence in the judiciary. Because it is efficient, some form of "selective publication" is probably used in most, if not all, jurisdictions today. The practice of "depublication" is unique to California.

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4. Professor, STEVEN R. BARNETT, of Boalt Hall agrees. See, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*. 26 LOY. LA L. REV 1033, 1037-1039 (1993): "For the federal courts, this limit on judicial power is embodied in the "case or controversy" requirement of Article III of the Federal Constitution. The California courts likewise recognize and apply the "case or controversy" requirement as a condition of the judicial power conferred on them by Article VI of the California Constitution."

Reportedly, over sixty percent of federal appellate decisions are not published.[5] In California, in the fiscal year of 1994-1995, only eight percent of the appeal opinions were published, while two years earlier, nine percent were published.[6] Five years before that about fifteen percent of California's appeal court decisions were certified for publication,[7] of which the supreme court ordered an additional ten percent depublished.[8] Each year, the California Supreme Court depublishes more appellate opinions than it publishes opinions of its own.[9] The reason for the increasing use of "nonpublication" is obvious: *the eraser is more efficient than the pencil.*[10] But the framers of the Constitution did not intend to sacrifice the public nature of the judicial process on the altar of efficiency.

Though the California Supreme Court has maintained absolute silence on the subject, a brigade of critics have written on the controversial nonpublication practice, calling for, at least, its curtailment and an explanation from the courts, if not an end to the practice.[11] Professor Barnett says that "the deepest objection to

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5. *See*, HOWARD SLAVITT, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication and Vacatur*, 30 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW, 109,120 (1995).

6. *See*, SCOTT GRAHAM, *Putting it in Reverse*, THE RECORDER, (Dec. 6, 1996)

7. *See*, GERALD F. UELMEN, *Losing Steam*, CAL LAW., (June 1990) at 33, 44.

8. *See*, PHILIP L. DUBOIS, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 469, 488 (1988).

9. See, GERALD F. UELMEN, *supra*, Note 6, at 43.

10. *See*, GERALD F. UELMEN, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?* 26 LOY. LA L. REV. 1007 (1993)

11. *E.g.*, STEPHEN R. BARNETT, *supra*, Note, 4, *infra*, Note 12; also, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine begins to Self-Destruct*, 45 HASTINGS L. J. 519 (1994); Professor Barnett believes depublication exceeds the constitutional power that is granted the courts (*infra*, Note 12), and that "nonpublication" is, in any event,

(continued...)

depublication is that it exceeds the judicial power." [12] In a well-researched treatise on the subject, Howard Slavitt, writing for the *Harvard Civil Rights-Civil Liberties Law Review*, submits that nonpublication "destroy(s) equal access to the system of precedent," and "hinders the possibility of receiving a grant of review." He further maintains that: "In addition to undermining the appearance of justice, nonpublication interferes with the separation of powers

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11.(...continued)
undermined by computer-age legal research. J. CLARK KELSO, *A Report on the California Appellate System*, 45 HASTINGS L. J. 433 (1994) at 496: Professor Kelso thinks depublication "is a practice that should be stopped." He condemns the unfairness of the practice, noting, at 491, that systems of nonpublication "bestow an unfair advantage" on litigants who possess the resources to collect unpublished opinions so as to exploit, "sub silento," their status as actual precedent. GERALD F. UELMEN, *supra*, Notes 7 and 10; also, *Depublication: The paper trail leading to a depublication should be accessible to everyone*, LA LAW., (Aug.-Sept. 1990) at 55. Professor Uelmen writes extensively on the subject and particularly decries the "secret" nature of the practice and notes that the increase in nonpublication closely correlates to a decrease in the grants of review by the Supreme Court. HOWARD SLAVITT, *supra*, Note 5, *infra*, Note 13, at, 109-110, writes: "The Due-Process Clause protects the integrity of the dispute-resolving role, but there is no corresponding constitutional guarantee to protect the integrity of the courts' law expounding function. This lack of systematic safeguards threatens the judiciary's ability to make principled decisions. The widespread use of effacing precedents -- selective publication, depublication, and vacatur motions -- evidences the need to protect the judiciary's law-expounding function."

12. *See*, STEVEN R. BARNETT, *supra* note 4, at 1037. Professor Barnett is of the opinion that depublication exceeds the judicial power that is conferred on the courts by the Constitution because: "Depublication, while it serves the court's function of making the law for the future, cannot be squared with dispute resolution as a defining attribute of judicial power. When the supreme court depublishes a court of appeal opinion, it dissolves no dispute, since the appellate court's decision stands. The same is true, to be sure, when the supreme court simply denies review of a court of appeal decision. The additional act of depublication, however, makes law – if only eliminating the appellate opinion as citeable precedent – and the law thus made is not supported by the decision of any case. It shares no ground with the appellate decision left standing; rather it impeaches that decision." (*supra* note 3, at 1039-1040).

between the judicial and political branches." He says, "because nonpublication often hides the actual state of the law it may substantially reduce the possibility of legislative reversal." He sees a threat to the separation of powers doctrine caused by nonpublication of appeal opinions: "Part of the justification for allowing a counter-majoritarian judiciary to interpret laws is that, except on constitutional issues, legislatures can overrule courts. Thus nonpublication may prevent legislatures from adequately policing judicial abuses."[13]

While the expansive views of the legal scholars point to the general importance of the "nonpublication" issue, Petitioner's perspective is necessarily personal and limited to his "injury in fact" and to the actual "controversy" he presents.

THE CONSTITUTIONAL QUESTIONS PRESENTED ARE RIPE FOR REVIEW AND PRESENT AN ACTUAL CONTROVERSY

Although Respondents articulate their argument obliquely, they suggest that Petitioner lacks standing under the "case or controversy" requirement of Article III of the Constitution [*Opp.* 6]. Respondents are mistaken. The Petition demonstrates both the jurisdictional and the prudential elements of "standing." *See*, the recently decided case of *Bennett vs. Spear*__, No. 95-813 (March, 1997). 1. Petitioner suffered an "injury in fact" when the Supreme Court of California directed nonpublication, rather than review, of the appeal opinion that conflicted with the legislative pronouncement on the subject of his right to receive distribution from decedents' estate. The harm is of constitutional proportions because, as a result of the "nonpublication" directive, Petitioner is subject to a law which, under California's Rules for Publication of Appellate Opinions [*Pet. App 33-37*] is not to be applied to anyone else -- including not to heirs, or potential heirs, of other probate estates who would be affected by the rule of *Reedy I and II*, were it published. 2. The harm is "fairly traceable" to the actions of Respondents who opposed Petitioner's claim at each step of the judicial process. 3. The harm is likely to be

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13. *See*, SLAVITT, *supra*, Note 4, at 119, 127, 133

"redressed by a favorable decision" because the questioned depublication order in *Reedy I*, and the nonpublication order in *Reedy II*, eliminated an unavoidable conflict with an intervening legislative enactment [Calif. Prob C. §6451]. But for the ordered nonpublications of the opinions, said conflict would very likely have required a supreme court review and reversal, or at the very least, "GVR" order. See generally, *United States vs. Schooner Peggy*, 1 Cranch 103, 110 (1801) ["if subsequent to a judgment, entered by a lower court, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."][14]

Petitioner presents a clear case where the "deny review and depublish" procedure of shaping the law has impermissibly infringed upon fundamental rights guaranteed him by the federal Constitution. To wit, not once, but twice, the appellate tribunal proclaimed a previously unrecognized (and now discredited) rule of law for California -- *that children of an adopted-out child are entitled to inherit from their biological grandmother.* Twice, the Supreme Court refused to publish said rule as the law of the state and, twice, declined to review it for error. First, in *Reedy I*, on December 16, 1993, the Supreme Court "depublished" the court-created rule (after having been alerted to the fact that the questioned legislation had been clarified by a re-codification which would take effect on January 1, 1994, well before any distribution of the estate could occur). Then,

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14. Respondents' comfort in the fact that *Reedy I* became final and "law of the case" for *Reedy II*, before the new legislation took effect, is misplaced. This Court has "jurisdiction to consider all of the substantial questions determined in the earlier stages of state proceedings, ...and [the] right to re-examine such questions is not affected by a ruling that the first decisions of the state court became law of the case." *Hathorn vs. Lovorn*, 457 U.S. 255, 261 (1982). When the opinion in *Reedy I* was "denied review and depublished" on December 16, 1993, the supreme court was informed of the intervening legislation that had positively changed the *rule of Reedy* which would become law on January 1, 1994. Had the court reviewed *Reedy I* for error, or it least GVR'd it, in light of the new legislation, rather than depublished, *Reedy I* would not have become final before the new legislation took effect. In that event, the law of *Reedy I* could not have determined the result in *Reedy II*.

in *Reedy II*, when faced with the replication of the "depublished" rule, the court again refused to approve its publication as the law of California, but also, again, declined to review it for error. Thus, the disapproved decision stands to determine distribution of the Reedy estate only. No other estate is affected by the "law of Reedy."

Arguably, the unexplained 1993 "depublication" order was initially an efficient, and harmless, application of the Supreme Court's law-shaping function. It would have been reasonable for the Supreme Court to expect that the clarifying re-codification of the questioned statute would supersede the court-created rule of law.[15] However, when *Reedy II* replicated the depublished rule of *Reedy I*, as "law of the case," rather than implementing the clarified legislative rule, the Petitioner was harmed. And, when the Supreme Court declined to review the reasserted decision for error, opting, instead, to again refuse it publication so the resurrected decisional rule would remain a "judicial outcast" which applied to the Reedy case only, the Petitioner was not only harmed, he was also the victim of an "unequal" and, therefore, unconstitutional application of the law.[16]

The constitutional questions presented by this case are now ripe for review in this Court. The state "court of last resort" has acted and has remained silent as to its reasons. Except for the extraordinary

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15. Respondents argue that Petitioner waived his right to seek review of the issues raised in this Petition by not filing a writ of certiorari in *Reedy I* when the California Supreme Court depublished that opinion [*Opp. 15*]. Such a writ did not lie at that point. Not only was Petitioner not harmed by the depublication\nonreview order of *Reedy I*, but issues of the constitutionality of the depublication\nonreview order were not then ripe for review. Distribution from the estate had not yet been denied to Petitioner, and it was entirely possible, in fact probable, that the 1993 re-codification of the questioned statute would be deemed to have superseded the rule of *Reedy I*. Moreover, the justices had offered no explanation for the depublication, and the question of the meaning and effect of "depublication" of *Reedy I* had not yet been pressed below. The question of "depublication" was, however, not only fully pressed in *Reedy II*, it became a central theme of the case in *Reedy II*.

16. California Rule of Court, rule 976(b)(1) and(2) [*see, Pet App 33*], directs that opinions which establish a "new rule of law" or which "resolve or create an apparent conflict in the law" be published.

procedure, described in footnote 3 above [see, Appendices "A" and "B" hereto] of recalling the remittitur and, perhaps, getting the court to rehear its "deny review and depublish" ruling and, at least, speak on the matter, for which there is no established procedure in the state, no further review in the state is possible.

THE COURT HAS JURISDICTION TO CONSIDER THE PRESENTED CONSTITUTIONAL QUESTIONS, FOR, TO THE EXTENT REASONABLY POSSIBLE, THEY WERE "PRESSED AND PASSED UPON BELOW." THE COURT ALSO HAS REASON TO TAKE JURISDICTION ON PRUDENTIAL GROUNDS AND "GVR" THE MATTER BACK TO THE CALIFORNIA SUPREME COURT FOR CONSIDERATION.

Petitioner makes no charge that he suffered any infringement of his federally guaranteed rights until publication of the opinion that denied him distribution from the estate was declined and review denied. Disregarding the fact that the "nonpublication-nonreview" decision is exclusively the province of the supreme court, Respondents also argue that this Court should refuse to grant certiorari because the issue of the constitutionality of the "*California vacatur*" practice, "was never raised at trial or appellate level for adjudication." [*Opp. 7, Cf., 12*]. Since neither the trial court, nor the inferior appellate court, are empowered to pass upon the constitutionality of the California vacatur practice, the issue of denial of "equal protection" resulting from the practice did not arise at those levels and was not raised there.

By implication, Respondents tacitly concede that the issue of the denial of equal protection rights resulting from a decision not to review and not to publish was specifically raised at the supreme court level [see, Pet. 12]. Moreover, as said above, the question of what "depublication" of the *Reedy I* opinion meant and what effect it had on the decisions to be made in *Reedy II* was raised and argued at every level and was a central theme of *Reedy II*.

The fact that Respondent formulates the questions he presents for review differently from the manner in which he raised the issue below is of no import. "A litigant seeking review in this court of a claim raised in the lower courts . . . possesses the ability to frame the

question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." [*Yee v. City of Escondido*, 503 U.S. 519, 535 (1992)].

While Respondent clearly pressed his claim in the court below, it is true that the California Supreme Court has remained absolutely silent on the matter. It is also true that, as a matter of due regard, the California Supreme Court should be given every opportunity to consider the constitutionality of its own rules and conduct, before this court passes on them. Whether to interpret the silence as indication that the California Supreme had passed upon the constitutional claim that was pressed, and rejected it, thus making the questions presented here ripe for review in this court [*Illinois v. Gates*, 462 U.S. 213 (1983], or whether to interpret the silence as an "ambiguity which calls into question to take and decide the case," so as to invoke this court's "GVR" power [*Lawrence vs. Chatter* __, No. 94-9323, 116 s. Ct. 611 (1996)] is within the prudential discretion of this court.

CONCLUSION

In any event, it is clear that this court is not restrained by jurisdictional concerns from granting certiorari. It does appear that "*the eraser has become mightier than the pencil.*" Unscrutinizeable depublication, nonpublication and vacatur are increasingly becoming the manner by which the law of this land is being shaped. The appearance of justice, fairness, and the public's trust of the judicial system are at risk. The constitutional questions presented here over the "*California vacatur*" practice are important and involve an actual controversy. They should be resolved.

June 6, 1997.

Respectfully submitted,

ERIKA W. SENTER, ESQ
4199 Campus Drive, Suite 700
Irvine, California 92612-2698
tel (714) 854-5309
fax (714) 854-4897
Counsel of Record for Petitioner
Lawrence B. Mucklow

REPLY APPENDIX "A"
CALIFORNIA COURT OF APPEAL
RULING ON MOTION

FILED
MAY 1, 1997

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

Estate of EDNA CLARA REEDY,
Deceased.

SHERRY E. FARROW HARVEY, et al.,
Petitioners and Respondents,

v.

LAWRENCE B. MUCKLOW et al.,
Objectors and Appellants.

E 014711
(Super.Ct.No.P61523)

County of Riverside

THE COURT

The court has considered the motion filed December 30, 1996, by appellant Lawrence B. Mucklow to recall the remittitur issued December 26, 1996. The court has also considered the opposition filed January 8, 1997, by respondents Sherry E. Farrow Harvey et al., and appellant's reply filed January 14, 1997.

The motion to recall the remittitur is DENIED.

Appellant contends that the remittitur should be recalled because it was mistakenly issued by the clerk of this court when a motion to stay issuance of the remittitur was pending. The stay motion was received by the clerk of this court on December 26, 1997, and returned to counsel without filing because the remittitur had already issued earlier that day. Appellant argues the stay motion was

constructively filed when it was mailed by certified mail on December 23, 1997, and was, therefore, pending before the remittitur issued. Appellant's reliance on California Rules of Court, rule 40(n) (inadvertently cited as rule 44(n)) is in error, because that rule applies only to briefs as defined in rule 40(k), which does not include motions or petitions, except for petitions for review or rehearing. Thus, the remittitur was not mistakenly issued while a stay motion was pending. Because no other ground for recalling the remittitur is applicable, the motion must be rejected. (See generally 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 603 et seq., p. 589 et seq.)

RAMIREZ

Presiding Justice

REPLY APPENDIX "B"
PETITION TO REHEAR REMITTITUR MOTION

ERIKA W. SENTER, ESQ., State Bar No.: 97872
4199 Campus Drive, Suite 700
Irvine, Calif. 92715
tel. (714) 854-5309
Attorney for LAWRENCE B. MUCKLOW

mailed 5-16-97

RECEIVED
May 19, 1997

APPELLATE COURT OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

IN THE ESTATE OF
EDNA CLARA REEDY,
Deceased.

E 014711
(Super.Ct.No.P61523)

SHERRY E. FARROW HARVEY,
ET AL.,
Petitioners and Respondents,
v.

LAWRENCE B. MUCKLOW
VIVIENNE LYNN KIRK,
Objector-Claimant/Appellants.

APPELLANT MUCKLOW'S PETITION FOR REHEARING IN THE COURT OF APPEAL OF HIS MOTION TO RECALL REMITTITUR ISSUED DECEMBER 26, 1996

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE
HONORABLE WILLIAM H. SULLIVAN

APPELLANT, LAWRENCE B. MUCKLOW, having reviewed the court's ruling of May 1, 1997 and decision denying his motion of December 30, 1996 to recall the remittitur issued in this case on December 26, 1996 now submits this Petition for Rehearing in order to respectfully call to the court's attention certain omissions and overlooked material issues in said ruling.

PRELIMINARY STATEMENT

This case, over the effect of adoption on intestate succession rights, explores the significant constitutional concerns associated with

the judicial functions of deciding and shaping the law in the uncharted legal waters of California's nonpublication law. On April 17, 1997, Lawrence B. Mucklow ("Mucklow")[1] petitioned the United States Supreme Court for a Writ of Certiorari on the decisions and "non-decisions" made in this case. He had announced his intentions to seek such a petition when he made his requests to stay/recall the remittitur, issued on December 26, 1996, on the California Supreme Court order of December 18, 1996 denying review and denying publication of this court's opinion in the case. In fact, the expressed, principal reason for the request to stay/recall the issuance of the remittitur was/is so Appellant could have a fair opportunity to evaluate his legal position, research the relevant law and perfect his rights for possible further judicial review. [See, Motion to Recall Remittitur, page 5; Reply to Opposition to Motion to Recall Remittitur, page 7.] Without a recall of the remittitur, a reexamination of the "non-publication/non-review" decision in California, was/is impossible. All time to seek review of the decision before the United States Supreme Court expired on April 17, 1997 (a month before this court issued its ruling on the remittitur motion). Appellant's certiorari petition to that high court (USSC No. 96-1684, docketed on April 22, 1997) tenders the following questions.

1.

> Does California's "nonpublication" law [California Rules of Court, rules 976-979] whereby the California Supreme Court can without granting judicial review, and without explaining its reasoning, abrogate the precedential value of an aberrant appellate opinion by making the suspect decision disappear for all except the involved litigants (the "*California vacatur*"), mark an abridgment of important fundamental rights of petition, due process, and equal protection of the laws?

2.

> Where a state's legislature and its lower court of appeal have contemporaneously spoken, but inconsistently so, on a questioned matter that is governed by statutory law, not

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1. Lawrence B. Mucklow died in January of 1995, while this case was pending on appeal. A probate was opened, and Mr. Mucklow's daughter, Karyn Story, was granted letters. As his legal representative, she elected to continue the appeal in the name of the original parties.

by common law, and a *California vacatur* had been issued on the inconsistent appellate opinion, does the state court of last resort violate its constitutional duty of judicial review when it abstains from adjudicating the re-asserted direct conflict between the judicial construction and legislative clarification of the questioned statute?

3.

Where statutory law, not common law, governs a state's intestate succession law, is the *separation of powers* clause of the Constitution violated by a court decree that directs distribution of an intestate estate to the children of decedent's adopted-out child when the states's legislature has unambiguously legislated that children of adoptees do not inherit from their natural grandparent because the adoption has severed the parent-child relationship through which succession rights flow?

Though the California Supreme Court itself has remained silent on the matter, California's unique "nonpublication\ depublication" law (dubbed the "*California vacatur*" in the certiorari petition) is the subject of a great deal of comment, explication and criticism in the legal literature. Prominent examples of those questioning the practice include the Harvard--Civil Rights, Civil Liberties Law Review (1995); Professors, Stephen R. Barnett of Boalt Hall, Gerald F. Uelman of Santa Clara University School of Law, and J. Clark Kelso of McGeorge School of Law, have each written extensively on the subject. [See for instance, Barnett, "*The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct,*"45 Hastings L.J. 519 (1994); Uelmen, "*Is the Eraser Mightier than the Pencil*," 26 Loyola L A. Law Review 1007 (1993).] In a 1993 symposium, Professor Barnett opined that this method of shaping the law, "offends the concepts of judicial function" and "appears not to comply with the California Constitution." While he notes that the last word on the meaning of the California Constitution belongs to the California Supreme Court, he suggests the question of the constitutionality of the nonpublication law might be put to the California Supreme Court by a "petition for rehearing" of the order for depublication or denying publication. (26 Loyola LA L.Rev. 1033, 1084 (1993). Obviously, if the remittitur issued (as it did in this

case) before such a petition can be mounted, the challenge under the California Constitution to the "nonpublication" order, cannot be brought -- unless the remittitur is recalled.

In a December 6, 1996 article in the *Recorder*, Scott Graham reports that according to the most recent Judicial Council figures available, in the fiscal year of 1994-1995, only 8% of the appeal opinions were published. Since the high number of "unpublished" (unscruitinized) decisions tend to erode public confidence in the judiciary, the remittitur should be recalled for public policy reasons so that this "secret" way of shaping the California law can be openly adjudicated.

The remittitur should also be recalled so Appellant can exercise all remedies available under California law. (It is also possible that the United States Supreme Court might decline review of California's nonpublication law as being repugnant to the federal Constitution because it may be persuaded that not all California remedies were exhausted.)

DISCUSSION

THE POWER TO GRANT REHEARING

Appellate rule number 27 of the California Rules of Court provides that a Court of Appeal may grant a rehearing after its own decision on any cause [exceptions not relevant] ... before the decision becomes final. A decision of a Court of Appeal becomes final as to that court 30 days after filing. [Rule, 24]. A party seeking a rehearing ... must serve and file a petition therefore within 15 days after the filing of the decision. This court's decision denying Appellant's December 30, 1996 motion to recall the remittitur was filed on May 1, 1997. This petition for a rehearing is made within 15 days of said filing and is, therefore, timely.

The grounds for granting a rehearing have evolved mainly through case law but are also referred to in the statutory rules of appellate practice which provide that, in certain instances, a petition for rehearing must be filed to perfect the right to Supreme Court review. Early case law held that the appeals court may grant rehearing on the ground that the court's opinion *misstated* or *omitted* a material fact or misstated or *failed to address* any material issue. [*In re Jessup* (1889) 81 C 408, 471]. Appellate practice rules provide that, absent unusual circumstances, the Supreme court will not consider a

petition for review based on an issue or material fact that was omitted or misstated in an appellate opinion *unless* that omission or misstatement is first called to the attention of the court of appeal in a Petition for Rehearing. [See, CRC Rule, 29(b)(2)].

Consequently, with reference to the decision denying the request to recall the remittitur that this court issued in this appeal on May 1, 1997, the following misstated or omitted material facts and significant issues presented by the petition, are respectfully called to attention of the court, and a rehearing thereon is hereby requested.

APPELLANT'S DECEMBER 23, 1996 MOTION TO STAY ISSUANCE OF THE REMITTITUR WAS IN THE NATURE OF A "BRIEF." THE PROVISIONS UNDER RULE 40(n) FOR FILING BY "CERTIFIED MAIL" SHOULD THEREFORE HAVE BEEN APPLIED.

The court denied the motion to recall the remittitur on the ground that Appellant's motion was not a "brief" within the meaning of California Rule of Court, rule 40(k). As Appellant pointed out in his motion, a request to stay issuance of the remittitur is not an "extraordinary" proceeding [see *San Bernardino Comm. Hospital vs. Offices of Statewide Health Planning and Development* (1986) 187 CA 3d 457, 463]. Such a motion is, therefore, not expressly excluded from the definition of a "brief" within the meaning of rule 40(k). It should therefore be deemed to be "included" to effect justice. Particularly so, because in this case, the stay of issuance of the remittitur is/was a necessary pre-requisite to a petition for rehearing in the California Supreme Court. Petitions for rehearing are expressly <u>included</u> in the definition of a "brief."

CONCLUSION

For all the reasons stated, it is respectfully requested that this Petition for Rehearing be granted and the court direct that the remittitur issued on December 26, 1996 be recalled.

Dated: May 16, 1997

Respectfully submitted,

ERIKA W. SENTER, ESQ.
Attorney for Appellant,
Lawrence B. Mucklow

[proof of service omitted]